Getting Out of the Trap

How to Stay out of Trouble with Student Loans, or Get out of Trouble if you're in it

By Ken Gibert

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I. Introduction

Student loans are rising, both in number of borrowers and amount owed:

> *At 43 million, the number of student borrowers jumped 92 percent from 2004 to 2014, while their average balances climbed 74 percent, according to New York Fed researchers. The average balance was some $27,000.*
>
> *While the 2007-2009 recession depressed other forms of household debt, Americans continued to borrow for education, with student loans now worth almost $1.2 trillion. Since 2010, student loans have been the second largest form of household debt after mortgages.*
>
> *Student loan balances have grown at an average annualized rate of 13 percent over the last decade as more Americans entered college and graduate programs, and stayed there longer. Also contributing to the rise, loans for parents have become more available while the overall cost of education has risen.*

"U.S. college student borrowers, debt rise last year - N.Y. Fed"

This Report Is for You If…

We are writing this report for two specific groups of people:

- those students or potential co-signers who are *considering* taking out student loans in any amount, and
- those who have *already* done so and are having trouble repaying the loans.

If you are in either of these groups, you are already in a minefield, and we believe we can help.

By the time you finish reading these materials, you should have (1) a strong, basic understanding of the way student loans work, particularly in bankruptcy, (2) a good idea how to research areas of concern regarding your own situation, and (3) a head start on understanding the law in your own jurisdiction. If you do not already have student loans, you will also have (4) plenty of help in assessing whether they are for you either as a student or co-signer. We offer some information on finding help as problems begin to develop in making payments on loans.

About Your Legal Leg Up

Your Legal Leg Up has been helping people protect their rights from debt collectors for over eight years. In that time we have gone from providing a "how-to" manual to a predominantly membership group with a variety of services designed to assist people in addressing a range of debt-related issues. We are committed to helping ordinary people understand their legal rights in the area of debt collection and related areas like debt negotiation and credit repair. You can beat debt collectors without having to hire an expensive lawyer if you have the right information, help, and encouragement.

Contact Us

We try to write in language anybody can understand, and we certainly avoid “legalese,” but some of the materials will take some work to understand. This is an unfortunate consequence of the law and situations themselves being complicated and requiring effort to understand. We do welcome questions, however, by emailing us at info@YourLegalLegUp.com.

On Student Loans: Considering the Bait

If you are considering taking on a student loan in any amount, we hope to give you both a fresh perspective and some tools and information you can use to minimize the harm the loans can do to you. We realize that many people think student loans are either a good thing or a “necessary evil,” but even if you believe that, remember that many tools that can do good things for you can seriously hurt you if misused or misunderstood. Student loans are, at a minimum, like that.

Already on the Hook

If you already have a student loan or loans and are struggling with repayment, you know what we mean. In this report we offer some guidance on making those payments, and we offer a realistic view of how you might try to escape from them through bankruptcy – and what your chances will be if you do try.

We do have a political viewpoint, as we shall make clear, but this report is not about the “political” problem. It is, rather, about the place where the political intersects your *personal*/*individual* life. To the extent we discuss politics, we intend that in a *practical* way: to give you material you can use to protect yourself against peer pressure – or to persuade the courts to give you a break if you’re already in debt and trying to use the legal system to get out of it.

We do not intend this report as a general commentary or an academic research paper. On the other hand, we know that you will take more action to protect yourself if you believe that doing so is the *right* thing to do morally and ethically. We believe that the way the student loan system is set up should anger you and justifies any honest attempt to escape its unjust impact.

The Politics of Student Loans – the Haves vs. Have-nots

The law of student loans presents about as stark a contrast between the “haves” and “have-nots” as any law in the United States. Federal and state policies all encourage students and their parents to go deeply into debt in order to “get more education,” but when that education doesn’t pay in dollars, the policies all favor the debt collectors and impose tremendous burdens for many, many years on those struggling to pay.

It is all roses and “social policy” when students are being encouraged to borrow, and all “business” when they’re struggling to pay off the loans. The scope of the problem is massive: approximately thirty-seven million Americans owe over one trillion dollars in student loans. See Dennis Cauchon, Student Loan Debt Surpasses $1 Trillion, USA TODAY, October 19, 2011. And over ten percent of those debts are in trouble.

Why it is the Way it is

The entities which are in the best position to know the value of their wares (in dollars) – the lenders and educational vendors – are permitted to hawk their products recklessly without the normal "blow-back" from bankruptcy. That is, one of the normal functions of bankruptcy is to allow creditors who lend for unprofitable purposes to suffer some of the consequences when the loans can't be repaid. The law of student loans is largely designed to prevent this from happening – with disastrous results for *everybody other than the lenders and vendors*.

To put it slightly differently, ***the reason the system works this way is that it was set up to profit very large, rich corporations: the schools and the lenders***. If you believe, naively in our opinion, that the system was set up for the national benefit of increased productivity and improved citizenship, there is still the question of why individuals who fail within the system are treated more harshly than anybody else who acquired debt for legitimate purposes.

We at Your Legal Leg Up have viewed the law of student loans as *so lopsided* and so systemically unfair that we have stayed out of the fray heretofore and have not previously offered significant material on student loans for pro se parties. This report, however, does offer hope and help to consumers. Things have gotten a little better than we believed for reasons we shall discuss below. Although the system is still far from fair, there are things you can do to improve your situation, and if you are on the hook you should waste no time in doing them.

As you will see, the law of student loan relief (as it comes through bankruptcy, at least) is largely dependent upon things which should really be *irrelevant* to the law. These include circumstances such as who your judge and lawyer are, and which federal judicial circuit you live in. We discuss what you might do to adjust to these realities in this report.

Organization of this Report

We start with a general look at the social/legal situation in which students and co-signers live, and then progress through the stages of student loan problems and what to do about them. It is helpful to know the social/legal background if you are considering taking on student loans. This background also affects your current rights as well as future possibilities if you have already taken out loans.

Although many of the people reading this report will read it long after "the damage has been done" and will not be looking for advice on *whether or not* to enter into student loans, we do hope to reach at least a few people with some guidance before it is too late. And we think it is more logical to address the student loan problem in a sort of chronological fashion. Thus we will address the general social picture and the decision facing beginning students and their parents (or other supporters) first. The rest of the report is for people already struggling with their debt burden.

Problems Developing

Next we will look at student loans that have soured or started to sour. We can point to ***some*** sources of help for people who are in the early stages of loan distress. This is beyond our expertise, however. We will put the issue in its *legal* perspective and offer a little guidance just to give you a small “leg up” in the search you will need to make.

There *is* some help out there, at least for some of these loans, and the sooner you find that help and begin to use it the better off you will be. Speed will help both in terms of getting real help from the programs and in shaping the legal conflict that will come up if you need to ask for more drastic help later. However, you must actually be careful about the help you accept. Loan consolidation and refinancing, along with the Ford Program’s “Income-Contingent Repayment Program,” in particular, are two-edged swords that you must handle with great care. Thus it helps to know the legal rules of bankruptcy (the ultimate “end-game” for debts) before you try to make adjustments to them in any way.

In other words, if you are having trouble making your payments now, you should read the section on bankruptcy. It will help guide your actions now with a view to future possibilities. Remember that in the law people do things and make agreements based on what the law would allow them to force you to do – or based on what it would allow you to force them to do. There’s an old saying that “negotiations are conducted in the shadow of the law.” You need to know what that shadow is.

Loans Gone Seriously Wrong

Finally, we address bankruptcy at great length. Bankruptcy discharge is the last, best hope for many who are on the hook for student loans. The bankruptcy law is very harsh regarding student loans, however, and it is also “whimsical” – largely dependent on what we might call “extra-legal” factors as we will discuss. We help fashion an approach that may help, but which (be warned) will involve careful thought and planning, and very possibly some sacrifice, to implement.

For reasons we will show, *we do not recommend pro se representation in bankruptcy litigation* in general. On the contrary, this is an area where, we believe, the skill, experience and relationships of a *carefully selected* lawyer appear to make a lot of difference. We will offer some help to guide you in your search for a lawyer. For those who really, really cannot afford a lawyer, however, our materials should at least help you on your way through the thicket of bankruptcy. Whether or not you eventually hire a lawyer, our materials will give you important information and help you evaluate your situation.

Analyzing the end-stage of student debt troubles is where we will spend the bulk of our efforts, both because it is where case law is generated – and analyzing case law is our particular expertise – and because all your prior decisions, from whether or not you dare to sign up for a student loan in the first place to which help programs you use (if any) should be guided to some extent by whether the law provides an “escape hatch” and how you use it if you need it.

Repetition

There is some inevitable overlap of material because every step of the way the choices you make will influence and be influenced by the other choices presented and your previous actions. The law of collection *should* have a big influence on the way you approach signing up for the loans. Schools and lenders have misguided students and parents about the connection between borrowing and repaying for many years. We intend to correct that.

Appendices

You will notice that the Appendices in this book are extensive, as we have included copies of cases from every federal circuit. Although the bankruptcy law was intended to be uniform throughout the country, and the main laws regarding student loans are federal (and therefore should apply throughout the country to everybody), the way the laws are applied in fact varies significantly from jurisdiction to jurisdiction. It also varies all too significantly from judge to judge, but a systematic presentation of specific judges would be far too ambitious for us to attempt.

The courts do look at each other regardless of jurisdiction, and understanding of the law of all the circuits will help you understand the law as it applies to your case. District courts and bankruptcy courts are supposed to follow the law as interpreted by their circuit courts of appeal, but there is perhaps a little more looking around at other cases in bankruptcy law than in most types of law.

Obviously we are not responsible for the content of the cases we include in the appendices (from a copyright perspective), but we have highlighted them, both for your convenience in reading the important parts and to demonstrate how ***you*** should read and analyze them. Our intention is also to give you a start on the process or research and analysis you will need to do if you have student loan problems. For more help on research, we have videos on research on our site; click on Special Help on Legal Research for free help with that.

A Note on Academic Integrity

We have used many sources in creating this report, and we do try to credit our sources as much as possible. This is not an academic work, however. Our purposes are, as we have said, two-fold: (1) to give people considering student loans warnings and enough facts to help defend them from confusion and the incredible peer pressure they will face; and (2) to offer help to people who are already suffering from student loans.

Our general premise was original to us (although by this we do not by any means suggest that we are the first to attempt this project, only that we began the process with reference to our own knowledge and legal research). Along the way, we have made extensive use of several commentaries, most notably: "The Indentured Generation: Bankruptcy and Student Loan Debt," by Daniel A. Austin, Santa Clara Law Review, Vol. 53, No. 2, pp. 329-420 (2013)*; The Truth about Student Loans and the Undue Hardship Discharge*, by the National Consumer Law Center; and *"The Real Student-Loan Scandal: Undue Hardship Discharge Litigation,"* by Pardo and Lacey.

There are many other sources as well, which we try to cite as appropriate. We footnote extensively only in the first chapter of this book, as we discuss social impact and policy. We believe that in most legal analysis, if it deserves to be said, it deserves to be in the body of the argument and not put where only someone with an unusual interest in what is being said is likely to look.[1]

We are extremely critical of many judges, as you will see – nor are we alone in having our passions raised. Social justice issues often create impassioned advocates on both sides, and we make no bones

[1] i.e., footnotes.

about our allegiances. We'll let our words on specific cases and decisions speak for themselves, but we recognize that there are important issues on both sides of the question.

You will note that many of the people in the legal machinery go unnamed here and elsewhere, but it is the legal process itself that is mostly to blame for this. There is a concept of legal research and analysis lay people should bear in mind: the law does not expect or, by in large, reward, *originality of thinking*. It may sometimes reward *clarity* disproportionately, on the other hand. This is probably why the *Brunner* case, for example, has been so unjustly praised and followed. That decision offers a sort of fake clarity that offers great camouflage for the self-righteousness and harshness that pervades this area of the law.

In any event, there is little concern about *where* most ideas that show up in judicial opinions have come from in the law except to the extent that the sources lend weight to the argument. We play by those same rules and would not expect to be quoted or cited in your arguments except when it might be to your advantage to do so.

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II. In Our Times: “Follow the Money” – A General Picture of the Law of Student Loans

The average cost of tuition has increased every year for almost forty years. Home values have risen and fallen, stock markets have soared, crashed, soared and crashed, nations have been born and died – and the price of college tuition has consistently risen though it all – every year for forty years. Is it a miracle? Is it some sort of wondrous recognition on the part of Americans everywhere of the great intrinsic or spiritual value of education? Is it some sort of new national recognition of the tremendous value of learning?

Don’t make us laugh.

The extreme price increase of education is the result of the cancerous growth of “easy” money along with, perhaps, the lack of compelling opportunities in the workplace which seem to make putting off joining “the real world” an easier decision to make.[2] The universities and lenders have done their best to make it easy to borrow (and to lend) for “education” because this huge flow of money both expands the profit centers of the schools, allowing them to inflate their tuition unfairly and provides the lenders their easiest money at unfair interest rates.[3]

Graduation rates fall, ex-students flood the welfare lines, and tuition still keeps going up. ***The students and their parents (or other co-signers) are the patsies in this scam***.

Please don’t misunderstand us – we do believe that education has great intrinsic worth. Aside from the question of its profitability and productivity, it is a potential source of endless delight. But as has often been pointed out by the commentators, treating the *beginning* of the student loan process as a great social policy of expansion of opportunity and social values for the benefit of all, and treating the *end* (payment) of the loan process as a cold business proposition of the payment by specific individuals to other specific individuals, leads to a lot of misery.

A process that encourages thoughtless borrowing – as the student loan programs have striven mightily to do (and succeeded all too well) – creates a large class of people saddled with unpayable loans. The banks and universities – as the experienced players in this game – are the ones who know better and could make changes to improve things, *but the law has insulated these wealthy players from the consequences of ignoring fiscal reality*. The law as it has evolved saddles the weakest and least

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[2] We were surprised to learn that our theory of economics actually has a formal name: the “Bennett Hypothesis,” named after William Bennett, Reagan’s Secretary of Education, from his article, “Our Greedy Colleges.” Bennett was not our favorite politician, and it proves that economics can make strange bedfellows. Nevertheless, we believe that the premise that easy money causes prices to rise is self-evident and is responsible for the dramatic and unjustified increase in tuition prices. We also agree with the related proposition that *the net result of student lending, along with skyrocketing tuition costs, has been profoundly undemocratic and has led to increased, rather than decreased, social stratification in the U.S. See,* Roger Roots, Roger Roots, The Student Loan Debt Crisis: A Lesson in Unintended Consequences, 29 SW. U. L. REV. 501, at 524 (2000) (“Far from the egalitarian results contemplated by the original proponents of the guaranteed student loan program, the final effect of the program has been the growth, rather than the reduction, of socio-economic disparity between races, classes, and ethnic groups.”) We also believe that student loans are responsible for a near-permanent *new* underclass of degreed poor people.

[3] For a more detailed discussion of the student loan industry, see *The Indentured Generation, pp. 338-46*.

knowledgeable of those involved with the costs of every mistake. It is bad, bad social policy. As you can see in our footnote 2, we believe this has very negative results for a democratic society.

Did We say "Unfair" Interest Rates?

We did. The interest rates charged for educational loans are unfair. Why?

Interest rates are made up of three things: a component for risk; one for inflation; and profit. That's simple economics. At the end of the repayment period, the lender wants its money back plus a profit, and the risk and inflation premiums are designed to get the lender the "real" value of its money back. Then there's profit.

Given that the inflation rate for the past ten years has been about 1%, you can find out what the lenders are up to by subtracting that 1% from their rates. As you will see below, it isn't exactly easy to find out the interest rates they charge in general. For most loans, that might be perfectly appropriate, since you would think that the risk element of each loan would be highly individualized, but where the risk element is largely negated by the law (governmental "guarantees" to the lenders and elimination of bankruptcy escape), all that is left, after the 1% or so for inflation is… profit (and a few negligible expenses). This is disguised in many ways by the schools and lenders.[4] The rates that get charged are much higher than they should be.

Did We say "Unfair" ***Tuitions and "Profit Centers" – for "Non-profit" Schools*****?**

Yes. Emphatically. Tuition rates are grossly excessive.

Tuition rates have been allowed to rise for almost forty years because the costs of that tuition have been disguised, understated, hidden, misrepresented, and generally presented in a deceptive way to students by the schools. During the past twenty years, graduation rates have steadily declined, average times in universities before graduation have increased dramatically (to the point where a "4-year degree" now routinely takes 5 years to get), and, incidentally, salaries and wages for anyone outside of the top 1% have gone down.

That sounds like a scam to us. Tuition rates should be going *down* where the value of the product declines so sharply, as it obviously has, not up.[5]

We believe that for most people, ***the value of education*** – in income-increasing opportunities – **must justify its expense**. That is, for every dollar spent on education, the person responsible for paying that dollar needs to get paid back *more than one dollar*. In money. Education needs to be a wise economic decision, in other words, and should be analyzed from that perspective at every stage.

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[4] See, Janet Lorin, Students Pay SLM 9.25% on Exploitive Loans for College, BLOOMBERG, June 5, 2012.

[5] One commentator has said he believes that the law's harshness as applied to student loans is justified because taking on student loans is the result of a "balanced and thoughtful process." Anybody who has been, or is going, through the college application and loan gathering process knows that this idea is preposterous. The process is rife with peer pressure and outright ignorance, not to mention unfounded optimism on the part of students and deception on the part of the schools (as we shall discuss). See, e.g., Indentured Generation, at 411 and following, and, for a case showing how thoughtless and destructive this can be, In re Todd, 473 B.R. 676 (D. Maryland 2012).

For the past twenty years, education has *not* been viewed on a realistic economic basis, nor has it been economically justified. Politicians can make whatever grand statements they want, can blame it on whomever they want, but facts are facts: for the past twenty years, students by the millions have emerged from educational institutions saddled with gigantic debts they are no more able to pay than they were when they entered the institutions. This is a massive failure of social policy and little less than fraud perpetrated by the educational institutions and lenders.

On an individual level, ***students and their supporters must recognize that non-profit schools are really only non-profit in name***. They accumulate wealth in foundations (which just exist to hold money tax-free and pay it out to the school), operating funds, marble (as in, the buildings are lavish and expensive) and high administrative salaries. They charge tuition in exactly the same way almost every other for-profit business in the U.S. charges: they charge "as much as the market will bear."

They charge as much as they can get people to pay, in other words, and widespread student loans have permitted this rate to get far, far too high by disguising the price. Society in general has allowed the schools to disguise their motives and methods.

Who Should Pay?

Whenever there is failure – and of course failure always happens to some degree even in the best-laid and fairest plans – the question is, who pays for it? As a matter of social policy, we could distribute the losses in one of four ways when educational degrees do not pay off:

1. We can leave whoever happens to get hurt by it to deal with it the best that they can;
2. we can let some group of the people who benefited from the action pay for it; or
3. we can make the people who profited most from it bear the costs.
4. The fourth alternative is that we can let a group unrelated to the benefits of the action pay for it (taxpayers).

If you are content to leave things as they are, you let the costs fall as they may or you use the fourth alternative, randomly assigning payment to the politically weak or inattentive. The victims are disorganized and, because they are selected by the fact of their victimhood, they are weak. The perpetrators, by contrast, are well-organized and powerful, ideally placed to avoid all consequences for their activities. The game continues under these conditions.

If you wish to change things, on the other hand, you will need to shift the costs to the people who profit from the action, and the closer you get to making the people who profit the *most* from the action pay, the more likely you are to change things - both by removing some of the profit of the action you seek to change and by placing the costs on those most able and motivated to make the changes. That is because the "repeat players" who profit the most are the ones who can *learn* the most from the past and are in the best position to address the costs and create change.

In the student loan business and the massive and unjustified increase in the costs of education, the "big money" repeat players are the universities and the money lenders.[6] They are the ones (although not

[6] We also know, of course, that the government is also a large player in this – of course. It guarantees many of the loans and is often the party suing the people who do not pay their loans. Our suggestion of a "success coefficient" below (see fn. 8) would partly address this by making the schools, in turn, guarantors and insurers of the government. The coefficient would be adjusted to reimburse the government for bankruptcy relief sought by

necessarily the *only* ones) who *should* pay if you want anything to change, and in the normal course of events, they *would* pay. Bankruptcy laws, which make unwise lenders and sellers pay some of the price for making loans to un-creditworthy borrowers or for un-creditworthy goals, would normally force lenders and sellers to take a more businesslike view of the transaction from the beginning.[7] The university/lender lobby has fouled things up, however, by changing the bankruptcy law.[8]

From the General… to the Particular

We know all this talk about the price of education isn't cool. We know that suggesting that schools and lenders are coldly collaborating to rip off and trick students into grossly overpaying for goods of questionable value is also totally uncool. Because education is about all sorts of noble things and has great value even if it doesn't help you make a living, right?

Well, sometimes the truth isn't "cool."

We have read about – and personally observed – the utterly destructive impact of massive debt overhanging a debtor's life. And we note that one in ten student loans currently goes this route (of "troubled" status). That is a travesty.

You know where we stand as a matter of social policy, but this report is not about social policy. We are simply trying to show you the social background of student loans. Making political noise is probably a good idea because it may take effect some time during your life. Making sure *you* don't get ripped off in

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schools' former students. This would negate the current condition of government guaranteeing a blank check to the schools regardless of the actual value of their services.

[7] To put it simply, bankruptcy serves a crucial economic function because it causes the creditors to bear some of the losses of poor economic decisions. In so doing, it forces entities that are in business to apply economic good sense to the transactions, rather than permitting them to make poor decisions which are then subsidized by others. If bankruptcy were permitted to function as it should, some students would not be able to obtain loans because they could not show that the loans were economically reasonable. When people with higher education are unable to get jobs that pay for loans, the economy is signaling that fewer people *should* go to college. Or at least that some of those who are currently obtaining the loans should not be doing so. Applying that reasonable real-life factor would cause fewer people to be willing to spend ridiculous amounts on college tuition – they simply could not afford to do so – and this in turn would force tuition prices down.

[8] Daniel Austin, author of the "Indentured Generation," suggests that one solution to the debt crisis is by making the "market value" of the debts be non-dischargeable to debtors in bankruptcy. We like that idea to an extent. The market would value a debt to be repaid over twenty-five years by someone whose degree was useless at a very low rate. As Austin points out, this would likely cause the lenders to take a harder look at the *borrowers*; if that look included some scrutiny of the *educational institution* – and some repayment mechanism from the school – we would like the idea even more. We believe this could be accomplished by having some sort of "success-coefficient" for the schools: if their former students were defaulting on student loans at a certain level, the schools would get a correspondingly lower amount per dollar of the student loan. It would work like medical insurance or Medicare payments, where the health institutions and doctors are left to address the paperwork and meet the qualifications.

Our point is not that education for its own sake is a bad idea. Our point is that *someone* has to pay for it, and the question is, *who pays for education that doesn't pay for itself?* We suggest that putting the burden on the repeat players, rather than the students who are transient in the system, is a wiser way to do it. Anything that would reverse the upward trend of educational price would also be a goal worth attempting. Allowing the bankruptcy laws to function in education as they do in other business, would very likely accomplish the same goal, as schools whose tuition drove their students into the poorhouse would face increased risk that their loans would not be repaid. The lenders know very well how to deal with that sort of risk.

the first place is more *immediately* important. ***So here's what you must keep in mind, whether you are a student or potential co-signer***:

1. Student loan payments are harder to make than you probably imagine (we'll discuss that below).
2. The overriding fact of bankruptcy law and student loans is that student loans are very difficult to erase in bankruptcy. The law is harsh, and the courts are not often sympathetic (to put it mildly). Once you take it on, you're stuck with it in most cases.
3. Co-signers are, in almost every jurisdiction, treated just as harshly as students when it comes to repayment or relief. That's the point of co-signing, actually, and the courts take it very seriously.
4. Negotiations with the debt collectors take place "in the shadow of the law" – meaning that you can't really expect the other side to give you voluntarily what you cannot force them to give you.
5. So negotiations with debt collectors tend to be frustrating and difficult.
6. If, as a parent or significant other, you co-sign a student loan, and the student cannot pay, the bank will look to ***you*** – and *you* will probably not be able to get rid of the loan in bankruptcy. In fact, there have been many situations in which the student who took out the loan was able to discharge some or all of it in bankruptcy, while the co-signers could not. This can completely ruin you financially.

Many people think that the fact that parents or other co-signers are treated just as the students themselves are is *unfair*, and perhaps it is. It is, however, *reality*.

If you are considering signing a student loan, then, you must take these facts into account and carefully evaluate the loan to make certain the student has a realistic chance to pay the loan back. ***You must look at the loan very carefully from the point of view of your own ability to repay it. Failure to do so has financially ruined many parents and students.*** Can we put this any more strongly? Student loans are simply among the most dangerous financial instruments that exist.

Before Signing

We intend to give parents and students a realistic view of the law of student loans **before they sign the loans**. We hope to help students *and their parents* make a more realistic appraisal of educational costs and payments in the future. We believe this rightly ***should result in*** students ***refusing to pay extravagant tuitions*** and making every effort to hold living costs down.

We *also* believe this rightly ***should result in parents taking a more active involvement*** in the lives of their student children. One of the good things about having co-signers of loans is that it requires a *second* judgment on the loan's desirability – not just the student's. All too often, we believe, parents have "rubber-stamped" their children's decisions or regarded the co-signing decision as not truly "belonging" to them (the co-signers), and we believe this needs to change. If you think of the whole college preparation and financing "help-industry" as an elaborate con game, designed every bit as much to deceive as to explain, you will more easily see how important it is to pay more attention than has historically been the norm.

Most students are at a phase in life where they really *cannot* evaluate the impact of these loans fully. They feel both confused and (ironically) invulnerable, and most of them have only a limited sense of the way money works in the real world. The same factors that cause them to be involved in more fatal driving accidents cause them to sign more loans.

Additionally, college promoters are treated (very wrongly) as if they had no financial interest in the decision the students are making rather than as salesmen. We think parents need to exercise strong, independent judgment that *helps* and guides their children, just as they would do if helping their children buy a car. Walking the line between guidance and being patronizing or condescending – and doing it in the face of a great deal of peer pressure (on both parents and students) – is not going to be easy, and we really can't help you there.

But we can give you some facts. And if you are a student, it is our goal to help you see through some of the glamorous visions, or the seeming social inevitability, of expensive education. It starts with looking closely at just *who* is trying to sell you *what*.

School Loans are Marketed as Impulse Purchases

School loans are marketed largely as impulse purchases – as items not to be considered, or to be considered only as little as possible – mere obstacles on the way to "getting your degree." It's always cool to act as if money is no object – unfortunately, money almost always *is* an extremely important object, both at the individual and institutional level. The student loan program, like fast and easy credit cards or payday loans, is designed to blur that important fact. They make it easy to get a loan without any real consideration of the repayment process that would otherwise exert a strong pressure on the borrower to hold the amount down to a minimum.

Remember: for the bank, your education is just a handy vehicle to attach a very profitable loan to. You're the sucker they're loading up with it. As businesses, they couldn't give a damn whether you get an education or not, or whether it's any good. And under the current law they don't *have* to give a damn about whether you get one anywhere near your money's worth, whether you finish it, whether the school helps you get a job, whether the school even survives long enough for you even to get your degree, or *anything*. Don't forget that – the **only** one left on the hook in this game is the borrower. That's YOU.[9]

Note that we are talking about *institutions* here. The *individual* people you encounter will not necessarily be this way at all, and they will certainly not *seem to be* so uncaring. They are picked for the

[9] In a famous decision the courts love to quote, the 7th Circuit in In re Roberson held that the courts and government "do not guarantee" the quality of the education people buy with their student loans and even ruled that the courts *could not consider* whether the borrower had obtained a degree that helped him or her get a job. The court went on and on about how the government "does not twist" the borrower's arm or force him or her to borrow money, and it seems like every arrogant and dishonest court since has quoted the decision extensively. But this is fundamentally dishonest. Even if the government does not force students into the loans, it designed the system which lures them into the loans and traps them once they are there. And as we have pointed out, the vast amounts of public money and easy loans have allowed and encouraged the schools to raise tuition to ruinous rates which does, indeed, force students to borrow if they wish get the education. Government shares some of the blame for what has happened.

job of selling you the program either because they either actually care about you and believe in what they're doing, or because they are good at making it look that way. You won't see many "Confessions of a Student Loan Salesman" come out of this crowd.

You must remember who signs their paychecks, however. They are institutionally your *adversary*, not your friend, and the more money they can get you to pay, by hook or by crook, the more profit they make – at an institutional level. And the more bonuses or job security the individuals have at a personal level. This is why so many lenders were bribing school officials to steer students their way. See, e.g., Kelly Field, The Selling of Student Loans, CHRONICLE OF HIGHER EDUCATION, June 1, 2007, at A15, and Jonathan D. Glater, Offering Perks, Lenders Court Colleges' Favor, N.Y. TIMES, Oct. 24, 2006. But even absent overtly unethical behavior, the system is designed to get you into trouble.

An Example of Marketing

Take a look at https://www.wellsfargo.com/jump/student-loans/students, for example. We do not suggest that there is anything legally wrong with this advertisement – it is simply characteristic of the industry – an example we picked at random (footnotes omitted):

> Focus on your studies, not your student loan
>
> Make no payments while in school[1] with a Wells Fargo private student loan"
>
> A college education is a worthwhile investment, but sometimes you need help covering all the costs. Wells Fargo private student loans may be able to help you pay for your education (minus other financial aid)[2], including all eligible education-related expenses such as tuition, housing, books, a laptop, lab fees, and more.
>
> Other benefits include:
>
> - Make no payments until six months after leaving school
> - Pay no application, origination, or early repayment fees
> - Select a competitive fixed or variable interest rate option
> - Reduce your loan cost with our interest rate discounts
>
> Applying with a cosigner may improve your chance of getting approved and could help you qualify for a lower interest rate.

See how easy that's supposed to be? Never an actual word about repayment other than in the context of *putting off* making the payments.

Or consider Discover's similar approach:

Simple Process

- Apply online or over the phone in just a few minutes.
- Consider adding a cosigner.
- Sign your loan documents online or mail them to us.
- Accept your loan terms.
- You're done!

Wells Fargo discreetly does not mention its interest rates. Discover says its fixed rates vary from 4.99 percent to 11.99%. Discover points out that with most loans (but not theirs!) you will pay “origination fees” (which is just bankerese for “instant profit to the bank”).

Try to figure out how much the loan rate will actually be on student loans – from any lender. It isn’t easy to do because they don’t want you thinking about the cost of what you are doing. And far less would they want you to go through the exercise we are going to suggest in the next session, where you compare different loan amounts and rates with a view towards how much of a burden they will actually place on your future. Neither the school nor the bank wants you doing that.

Compare getting a student loan to what it takes to get a home loan if you want a little more of a dose of reality, or consider a business loan. To get that, you must demonstrate to the bank *how* and *when* you will pay them back, let them examine your business plan, and put up a large amount of collateral. You won’t be told to “focus on your business and not your business loan!” When businesses talk to businesses, they address them with respect, knowing that deals will only get done if they make financial sense. Compare that language and tone with the patronizing and pampering attitude you get as a prospective student borrower. It’s easy to mistake that pampering with *respect* – but that isn’t what it is. It’s used-car salesmanship.

Other Marketing Methods

The schools have been excellent at public relations for a long time, and many of their most insidious methods have their roots deeply in problems that were not originally, perhaps, of their own making. For example, forty years ago, education was probably a good deal financially but was, nevertheless, beyond the reach of many people. It was in the interest of both the schools and their students for the schools to help their students find ways to participate. Parents have always wanted better things for their children, high schools want to help their students move forward, too… and so there developed a broad network of people helping students find financial aid. It was a very reasonable and beneficial thing – back then.

We are not criticizing this network or the people who are, or were, in it. We merely point out that together they *now* generate tremendous peer pressure on parents and students to conform to the financial demands of the schools rather than to urge the schools to lower their prices. There is very little official suggestion to the students to look for alternatives to “higher” education. They create an expectation that students will go into college and beyond if at all possible. And the “importance” and “necessity” of doing so is reinforced throughout our culture.

These things exert strong upward pressure on tuition prices despite the fact that so many students are unable to find work using their degrees after they graduate – if they graduate. And graduation rates are down – again, this is because the main parties to the deal, the schools and lenders, have reduced incentive to see graduation rates go up.

All these factors make it more difficult to apply economic reasoning to the decision or to walk away from a bad deal offered by the universities. The universities have capitalized supremely on that fact and do, actually, offer most people a bad deal most of the time.

The Real Cost of Student Loans

If you are a parent or student, you must ignore all the peer pressure pushing you in one direction, ignore all the easy talk, and look at the prevailing law and the world around you and try to assess the risks and benefits of student loans in a realistic way.

What this is really going to mean, for starters, is taking a hard look at where the student is going to go for their education, how much it charges, and what their lifestyle is going to be while at school. Easy for us to say, right? But nevertheless, you must consider that ***every cent*** of ***every loan*** you get related to your education is going to have to be paid back – with interest that, in many cases, will dwarf what you would pay for a home (see the *Hixson* case, below).

Many bad things can happen along the road of life, but those loans are going to be a serious and very, very meaningful weight around your neck as long as they last. It is probably not possible to convey just how annoying and confining these things can be. Students entering the “four-year” college program don’t really have a significant income or experience to measure the weight of the payments in meaningful, present-day terms.

Let’s do an exercise to try to help put things into real-life perspective.

Tuition at Yale University is now almost fifty thousand dollars per year, and with “room and board” added, the price in 2014 exceeded $63,000 ***per year***. Harvard and Stanford were about the same, but even a year of undergraduate school at the University of Georgia (my home state) will cost over $40,000 per year for an out-of-state resident (more than half that for in-state).

That means the average price of a Yale undergraduate degree – assuming a four-year stay (which is no longer the average at many schools) and a constant price (which hasn’t happened in forty years for universities as a whole!) – will be about $260,000. If you borrow that much, and the interest rate averages 9% and you want to try to pay that off in 4 years, your monthly rate will be **$6,470.11** for the four years. Your total payments will be over $310,000 (assuming that payments and interest begin after graduation).

There's obviously no way many people could afford anything close to that per month. So let's say instead that you want to pay in ten years – that's quite a long while to carry a student loan, right? Fine – your monthly payment will be **$3,293.57.** That's about $39,000 per year in *after*-tax dollars (with the total slightly over $395,000). Still no way for 99% of the population. We'd better make that ***twenty*** years. How much per month is that? That brings it all the way down to **2,339.29.** Per month! And the total would come to over **$561,000**. Again, we are speaking of after-tax dollars because costs of education – reckoned by the courts to be an enriching investment that cannot be outlived – is not generally a deductible business or investment expense in the eyes of the IRS.

What does it take to make a debt payment of $2,340 *per month* for ***twenty*** long years? That is almost thirty thousand dollars in after-tax dollars, too, per year. Very few people could afford that, and we are hard pressed to imagine anything at all that would justify such an enormous payment for approximately half of your professional life. And parents – ***what would an unshakable obligation to pay $2,340 per month for twenty years do to your retirement plans?*** In all likelihood, it would crush them forever for most people.

In our 4-year scenario above, the payments equal approximately $78,000 per year. To make that at all, you would have to be in the top tax bracket – so figure you have to earn at least $100,000 per year at that rate before you get to spend a single dollar on food, clothes, housing or other expenses for yourself. The ten-year repayment plan requires a salary of over $50,000 per year just to accommodate the loan payments. Half a million dollars over ten years before you can buy ANYTHING else. That won't be unreachable for *everybody*, but it is well out of the reach of ordinary people.

You should be *extremely* reluctant to let anyone chain you down for anything like this. The only way such anchors could ever be justified is ***if their ultimate value far exceeds their cost***. In our opinion, for most schools and for most students, they simply, but emphatically, do NOT.

Hold on a minute here!

Now, of course you're thinking you would not be borrowing the total amount, right? Just for undergraduate school? Probably not. There will be grants and other forms of aid – so much so, in fact, that the whole advertised "cost of tuition" becomes a farce, doesn't it? College tuition is much like the hyped up sales letter that assigns a price of $3,500 to some item, but if you act now, you can pay "only three easy payments of $139." Official tuition "cost" is the moral equivalent of that sales letter, and you should give it just the same amount of respect. (And note that they call it "cost" *always* – instead of "price," which is what it clearly is – "cost" makes it sound like it's out of their control.)

A School's official tuition price is not designed to *inform* you, but to *control* and *manipulate* you, so that you more willingly pay what they really want. If school tuition were a consumer item overseen by the Federal Trade Commission, we guess that the schools would be constantly facing enforcement actions for deceptive marketing. In the marketplace, an advertised price must bear some consistent relationship to the price that is actually charged. Having an artificially inflated price and a "50% off!" tag permanently attached to it is considered deceptive marketing and will draw agency enforcement. But this is exactly what schools are doing.

Here, for example, is what Washington University says about its tuition:

> Washington University relies on tuition income to pay more than 60 percent of the cost of undergraduate education. Most of the remaining cost is generously funded by gifts from the university's alumni and friends and from income from the university's endowment. http://bulletin.wustl.edu/about/tuition/

In other words, the advertised price is approximately 40% overstated. We are not saying this is legally fraudulent (although we *do* believe it should be considered that way), and we certainly do not suggest that Washington University is the least bit unusual in its approach, but we still consider this presentation to be misleading and deceptive. It is saying that the advertised price is not actually meaningful, like a list price on cars in a used car dealer's lot. In the rest of their publications, no doubt, they talk about the high "cost" of providing what they do, but anyone observing the school over the past ten years could tell you that the university is bursting with money, as they have constructed dozens of fancy new buildings during that time. Many of its students aren't faring so well, unfortunately.

You probably won't pay full listed tuition. However, students have been emerging from colleges with larger and larger loans, and totals over $100,000 are not uncommon,[10] so our example is, unfortunately, "in the ball park."

Here's a link to a payment calculator you can use to find out your loan payments over a time period (that you can name) at an interest rate you can designate: http://www.calculatorsoup.com/calculators/financial/loan-calculator-advanced.php. You can use this calculator to figure out what a specific sized loan over a specific period of time will cost. Go to that link, put in the numbers, and think realistically about what the numbers it puts out mean to you in real life terms. Click here for much more analysis of that question on our site.

A More Modest Example

Let's try an example a little "closer to home." I live in Missouri. What if my son wants to go to University of Missouri – how much does that cost? Good luck figuring it out from the University's web page: http://cashiers.missouri.edu/costs/ but I do note that it will cost $274 per credit hour (for in-state) plus some mandatory "additional fees" of about $500 per semester. Let's assume my son wants to attend for 15 semester hours per semester. For the year, that is 30 semester hours x $274 = $8,220 per year. Now add about $1,000 for those "mandatory" additional fees, bringing us to $9,220 per year – and now, room and board.

Searching for that reveals a page that attributes a cost of $9,640 for room and board, and also suggests some other costs – bringing the total to just about $25,000 per year. For four years, that will be about $100,000 – without including increases, which of course the university reserves the right to add at any time (and has consistently done). If the student (or his parents) must borrow *half* of that, the loan will obviously be $50,000. At 5% interest, that will be $530/month for ten years, for a total of over $63,000.

No matter what my son studies at the University of Missouri, there will be "additional fees" per tuition hour varying from $25 to $92 *per credit hour*. These seem to be based on to what extent the university believes the degree (if any) would actually be useful (if at all). So the general "Arts and Sciences" degree

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[10] The average debt load for a four-year college graduate in the class of 2010 was more than $25,250.7 Students in graduate school borrow much more, averaging over $43,5008 and individual loan debt exceeding $150,000 is not uncommon. "The Indentured Generation," *supra* at p. 332.

adds $25 per hour over the advertised rates, while the "health professions" cost about $92/hour more. We would suggest, in reality, that these additional fees would be more than adequate to cover the entire reasonable costs of the education all by themselves if there were actual, unhampered and legitimate competition.

In any event, the price simply isn't accessible to most people, and whether it could be said to be remotely "worth it" is extremely dubious. Easy student loans obscure this fact and lead to lives of poverty for many students. The extravagant prices show the value of school marketing and the force of mindless public acceptance. Click here for a site that could help you make comparisons between schools, but nothing we can do will help you find a reasonably priced school. They no longer exist.

The Weight of Student Loans

Students – imagine the difficulty and annoyance of paying back a particular amount of money, and then try to multiply that feeling by five to get a closer view of what it will feel like.

> Anything over **$200** per month for a typical undergraduate degree, in our opinion and experience, is going to exert a *vastly* disproportionate and oppressive effect on you.

In our opinion, you would need a strong justification for a student debt anchor of one cent above $200 per month, and believe us, you will feel it keenly. A debt anchor of *$400 per month is much more than twice as bad as $200 per month*, so this is definitely not a case of "in for a penny, in for a pound," contrary to what just about every student thinks. Every additional cent of debt weighs ***more*** than the previous one and should require more, and very specific, justification – not less, as you will be tempted to do.

If you wanted to pay ten years of $200 payments at 9% interest rate, you could borrow – in total – just slightly more than $15,000. You would *definitely* feel that. And it would pay for less than a fourth of a single year at Yale.

Parents – in our opinion, one of the worst things about the student loan program is that it has been designed to cause parents to rubber stamp their children's decisions – and often to sign them as guarantors of the payments. You must defeat this feature of the university/bank operation. You must take a hard look at the numbers and understand their reality even when your child/student does not or minimizes their effect.

You must carefully exercise your ***own*** judgment and be willing to refuse to co-sign a loan that would destroy you financially if it goes bad. You should, in our opinion, offer strong guidance and warning about loans that will be difficult for your child to pay, and you should never sign one that does not seem comfortable for you or your child to pay – because almost certainly one of you will do so, and either of you could realistically end up paying. Fifteen thousand dollars ($15,000) at 9% interest repaid over ten years is about $200 per month. Very few of the people visiting Your Legal Leg Up could pay that much without feeling it keenly. Will your child be able to do it? Will you?

Pardon our (over?) emphasis of these points – it is our belief that students and parents have routinely, and disastrously, ***under-***emphasized them. It is also our belief that the student loan program has been designed deliberately to *cause* you to underemphasize the difficulty of repaying the debt.

Getting Advice

Everybody in the educational or lending business shares an interest in causing you to disregard the terrible risk these loans pose to your future well-being. Therefore you are smarter to look to business-people, or even the career guidance people at schools if that's all you can find (at least they have to face students struggling with loan payments) for help in assessing the impact of tuition and loans. Whatever help you get, you must take this part of the educational quest – payment – deadly seriously.

The banks definitely will take it seriously if anyone starts missing payments, and as you will see in the litigation section below, missing payments causes the loans to get *bigger*. That won't surprise you in the abstract, of course, but when you read case after case of people having paid thousands and thousands of dollars over many years and ending up with a loan much larger than it originally was, it may take on a different flavor.

We know that the schools *pretend* to try to get you to take your loans seriously, but the process *they created* is designed to make that impossible. How could you take the price seriously when you are presented a number that is non-negotiable and merely invited to "figure out how you can afford" it? And then the school will present you as many "easy" loans as possible so that you *can* pay them. Everyone you will talk to, within the school, will depend upon your taking the bait and getting hooked. In our view, this does not make them "liars." It just means *you cannot rely on their judgment at all* – you can only treat it as one factor among many. Like a salesman's patter.

If you are considering taking on any amount of student loans, we suggest you read the remainder of this report so that you understand just what it is you're getting into.

III. Souring Student Loans

What to do when you start having trouble making payments

Many people have come to our site for help with student loans, and the newspapers are filled with horror stories of students and their loans. We believe a massive fraud has been perpetrated on students over the past twenty years by the universities and lenders – and that it is continuing to be perpetrated. For purposes of this section, however, we simply take it as a given that, after graduating, many students begin to run into financial trouble as they try to make payments on their loans.

As we will show below, it is extremely helpful in *later* stages of debt trouble if you to take immediate, rational action in the *earlier* stages of trouble to get help as soon as debt repayment becomes problematic. It's even a good idea to consider these factors before signing the loan or making a single payment.

Getting help at an earlier stage – while you are still current with your payments – can make a lot of difference in the availability of some of that help. Some of the programs we mention below ***will not apply*** to you unless and until you are up to date on all payments – and many are time-based (relief comes after a specified – long – number of years). Some, like the Income Contingent Repayment Plan (ICRP) that we will discuss at length below and in the cases, seem to be more designed to prolong debt servitude than to provide any real help.[11]

These programs operate more on how long you are in the specific help program itself than how long you have made (any sort of) payments. That means that the longer you wait to get help, the less help you will get. It makes sense to get into them immediately if possible – and if it makes sense for you to get into them at all. They may not apply to private loans, so consolidation could be either disastrous (turning all your loans private) or beneficial under some circumstances (turning your loans public) – you need to know these facts right from the very beginning.

We are not experts in student loans or in funding help for people suffering from them. We do not know all the facts you need to know. Instead, we provide just a beginning so that you will, at least, know that there are programs out there. Our goal here is to give you some of the vocabulary and links you will need just to get a proper search underway. There are many people and companies that will offer to help at various prices – it appears to be an area full of help – and rip-off artists. You should not accept an offer of help from *anybody* before researching that person and checking comparable programs for price. We are extremely skeptical of these businesses and suggest you should be, too, but this does not mean that none of them are worth it.

Help

[11] There can be some benefit from the ICRP, no doubt, but as it functions in the cases we've seen, it mostly serves to prevent bankruptcy from helping. Whether it results in more money being repaid is not clear, but one thing it certainly does is prevent the government from having to recognize a loss on the accounts in it for a long, long time. This probably has more political impact than anything else.

In this section we offer some links to programs that may provide help if you are having trouble paying your student loans. In most cases, the links are not to our site or other sections of this book, and as we have said, helping with student loans is not our expertise. Thus we suggest that you take a look at the materials cautiously and consider them as just the beginning of your search. The time you spend making sure you get the right help will prove to be extremely valuable, though. Very few things in life pay as well as negotiating or getting a "deal" on a large debt. Take your time with faith that it will pay off very well eventually.

Income Based Repayment

One of the programs that might help you deal with student loans (not a negotiation) is an "income-based" payment (IBR) program. The plans call for a payment "cap" of a certain percentage of discretionary income and provide for loan "forgiveness" after a certain period of time. The program seems, at first sight, to be very reasonable, with a limit on payments and amount of time that will be required. They are for federal loans. Click here for the government page on this program.

The drawback is that "forgiveness" of a debt is considered by the IRS as "income" in itself. To put this into simple numbers, if at the end of the program, the lender cancels $100 of debt, it will normally be considered taxable income.

That sounds innocent enough (although tax never sounds actually *pleasant*), but the problem comes when numbers closer to reality are used. Suppose you have a student loan debt of $100,000 at 5% interest.

- That means that you must pay $5,000 per year to reduce the debt at all.
- That's $417 per month – in after-tax dollars.
- If you did that for 25 years, you will have paid $125,000 towards the debt during the period of your debt slavery, and the "rest" will be cancelled and (probably) taxed.
- That means that in year 26 you will show income of $100,000 and will owe at least $35,000 in taxes unless you can show that you are *then* insolvent. If you cannot, you will have a new debt that probably cannot be discharged if you do become bankrupt.

What kind of deal is that??

This plan can be a good deal for you ***if your income is rising***. In that case, you get a little payment flexibility earlier, while you aren't making much money,[12] in exchange for the time. Since you ultimately

[12] The main drawback to this program is that "forgiveness" of a debt is considered by the IRS as "income" in itself.

The ICRP can be even worse. Suppose that you are disabled and can only pay $100 per month on the debt out of your disability benefits (and you will be required to make whatever payments you can "afford"). How does that work out under the ICRP?

Not well. (continued)

After the first year, your debt has gone (using general numbers that probably understate things) to $103,800. That is, it's $105,000 minus the $1200 you paid. You're going to pay almost $5,200 the next pay off the whole loan, you don't have the tax hit at the end. In other circumstances, the program can simply multiply your difficulties. The way the courts *regard* this program varies by jurisdiction (to an extent), as you will see below. Although none of them seem to disagree that you may eventually take a tax hit, they do vary as to how seriously they take the problem – in general, the courts have been remarkably callous to the problems of student debtors in every way, including this one. Click here for a fuller discussion on this issue of taxes.

You should have a realistic understanding of your long-term prospects before signing up for this program. If your income is rising (and likely to keep rising) such that you can pay off the loan, the ICRP can make sense. If this is not clearly what is happening, then the analysis becomes more complicated because some courts see a refusal to do the program as a sign of "bad faith" (which can hurt you if you later need help in bankruptcy) whereas using the program can increase the length of your debt slavery a long time by expanding the "term of the loan" by many years.

Public Service Plan

Another and probably better sort of help is available if you are doing some sorts of public or nonprofit service as your job: you may be able to get help from the federal government. Click here for the link that will take you to the government site discussing that help. Or you might prefer this site. This program is designed for only certain kinds of loans. Here's what the government says about it:

> Only loans you received under the William D. Ford Federal Direct Loan (Direct Loan) Program are eligible for PSLF. Loans you received under the Federal Family Education Loan (FFEL) Program, the Federal Perkins Loan (Perkins Loan) Program, or any other student loan program are not eligible for PSLF.
>
> If you have FFEL Program or Perkins Loan Program loans, you may consolidate them into a Direct Consolidation Loan to take advantage of PSLF. However, only payments you make on the new Direct Consolidation Loan will count toward the required 120 qualifying payments for PSLF. Payments made on your FFEL Program or Perkins Loan Program loans before you consolidated them, even if they were made under a qualifying repayment plan, do not count as qualifying PSLF payments.

There are serious limits to the kind of help this offers, but for some people this will be a way out of difficulty. Click here for more information. We have not seen any cases addressing whether the money

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year not to lose ground. Since you still only pay $1200, by the end of the second year the debt is up to $107,800. Now you've got to pay $5,400 not to lose ground. If you pay $1200 yet again, your debt at the end of the year is $112,000. In three years, you've gotten $12,000 behind. If things go on this way, at the end of the 25 years, you will be "forgiven" an amount approaching $500,000 and will have a tax liability of approximately $200,000. As we have said, how this "income" will be considered is uncertain. In ***In re Gesualdi***, *505 B.R. 330, 346 (2013),* the court examines the tax issue with *some* seriousness, but we are skeptical of any analysis which treats incurring tax so flippantly because it is impossible to foresee tax rules over the long-term. We believe it is safe to say that taxes will stay the same or go up for average people for the foreseeable future.

forgiven at the end of you term of public service employment constitutes income – but we cannot say with any confidence that it would *not* be taxed as income. You should be aware of the possible double-edged nature of any debt forgiveness program.

Another, similar program, the "Pay as You Earn" program, is, like the IBR program above, based on a type of financial hardship. The program provides for payment caps and loan forgiveness if your payments would be too much for you to be able to afford under the standards established by the program. You can find out about that here: Pay as You Earn.

For more help on student loans, you should check out the Project on Student Debt. If you aren't sure what kind of loans you have, check out the National Student Loan Database System for Students and select "Financial Aid Review" for a list of all the federal loans to you. Click each individual loan to see who the servicer is for that loan (this is the company that collects payments from you). Remember that system shows only your federal student loans, however, and not your private or state student loans. Contact your school to see whether you have non-federal loans if you are in doubt about that, as they keep a record of them.

You could also check out consumer finance. If you are active-duty military, there may be benefits helpful to you under the Service Members Civil Relief Act. If you're not in the military and have private loans, you have fewer options, but take a look at: Paying for College. For an article on reducing student debt without paying for it or click here for a free ebook on ways to get rid of student loans without paying for them. We had no part in writing this ebook, however, and cannot vouch for its details other than that it seemed accurate when we looked at it.

It is worth noting that all these forms of help apply to students, but not to co-signers. Thus if a student fails to get help or loan forgiveness, this can often hurt the co-signers. If a (former) student signs up for the ICRP or Public Service program and makes miniscule payments, they are still not in default of the loan. This would protect any co-signer from collection. One might worry that if the student is (eventually) forgiven the loan, that might create income in the co-signer, who is also relieved of the debt hanging over his or her life. We are not tax experts, but this seems extremely unlikely. The contingent obligation to repay, when extinguished by forgiveness, would likely be considered "too remote" to be taxable income. It would expire without income tax consequences, we believe.

Because using the ICRP prevents a default, it would suggest possible tactics in the case of severe difficulty. If the co-signer is elderly, taking the ICRP could protect that co-signer from liability for life – and then upon the co-signer's death, the guarantee would eventually automatically dissolve and become worthless anyway. Likewise, using the ICRP could protect a co-signer long enough for him or her to put assets where they could not be collected upon. If you consider this route, you must remember there are various "look-back" or "claw-back" rights designed to prevent debtors from defrauding creditors to consider, so if you are going to consider protecting yourself in this way you would be wise to consult an attorney about it before attempting to do it.

Negotiating Student Loans with Debt Collectors

Unfortunately, there's really very little or even no *negotiating* with most debt collectors on student loans. There are few market pressures on them to settle at all. Federal student loans have no statute of limitations, so the collectors aren't worried about the debt ever expiring (although private and state loans are subject to state statutes of limitations). The companies that issue the debt are large and government-subsidized, and "educational loans" are one of the last great sacred cows in our country.

On the other hand, loans that have been transferred or "assigned" to debt collectors will give you some of the same opportunities you would have for any transferred debt: all sorts of issues of proof become more problematic for debt collectors. Our debt defense materials (in general) would probably be useful to you in that situation.

Negotiating Pointlessly

For some reason, lenders will not usually accept partial payments on student loans. If you are negotiating with them and offer to pay something less than what they claim you owe, they will usually refuse even to entertain the idea at all. And they will often return payments that you attempt to make. This can turn negotiating with them into an empty, but highly annoying and distressing, exercise. You should still do it.

You should still negotiate with the student loan debt collectors because your efforts will eventually make a favorable impression on a judge if you end up in bankruptcy – which so many student loans do. As you will see, most U.S. jurisdictions (that would control any bankruptcy action) follow the "*Brunner*" test (we'll discuss below at length). This test has three parts,[13] including what the courts please to call a "good-faith" test. This "test," in the view of many judges, seems to require having made payments you could not make – or pointlessly arguing and negotiating with abusive and nasty debt collectors.

The point of all this is to demonstrate how serious you are about paying something you can't. Even where making payments is not required (if you truly cannot afford to do so without practically starving), the courts are favorably impressed by your continued efforts to "work with" the debt collectors. Thus it makes sense to continue to speak to the debt collectors and to continue to try to get them to accept whatever payments you can offer. If the collector refuses to accept a partial payment, you can send it anyway.[14]

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[13] The Brunner test requires that a court look at three factors: (1) present inability to make student loan payments without suffering some "undue" hardship; (2) evidence indicating that this inability to pay will continue for a long time; and (3) proof of good faith efforts to repay. We will discuss each of these requirements at length in the main text.

[14] If they refuse to accept it, you will be "having your cake and eating it too," so we do not, for example, suggest sending money orders or any other form of payment where it actually costs you to send the money. On the other hand, if they do not already have your bank information, you should not send them a check on your main account, as this would smooth their path to garnishment. Instead, set up a different account – in a different bank than you usually use – that you will use to make the payments. We suggest you put enough money into the account to cover the check, and send it (it is illegal to write a check on assets which are not in the account!). If the lender sends you the check back, save it and write another check on the same balance the following month. This will allow you to continue to offer to pay – at no cost. It will probably impress the bankruptcy judge with your "good faith."

Likewise, you should inform the debt collector of your addresses (but not your jobs!) and should not, in general, act like you are hiding from them.

You should keep accurate records of your communications with student loan debt collectors – records that show when you spoke and for how long, what you offered, what you experienced… in general the things that would persuade a normal person that you were trying your best to get someone to accept what you could afford to give. And of course how that effort was received.

Talking to debt collectors is annoying and depressing for some people, and we are not suggesting that you speak to them *every* time if you have an obnoxious collector or simply have nothing new to say by any means. On the other hand, you are scoring "good faith" points every time you do take the call. The trick is not to take what they are saying personally. Understand that you are somewhere between a simple number that they call and an opportunity to make income for themselves. If you have an abusive collector, you should tell him or her that you will be recording the phone call – and then do it. Their abusive calls are another thing that will play well to a judge. We make this suggestion regarding debt collectors for student loans only. For other types of debt we do not suggest talking to the debt collector, and even for student loan collectors we recommend caution and control.

Remember that you are quite possibly not going to accomplish anything *with the debt collector*, but you *are* advancing your cause in a completely different way that may well be even more important. Thus you should not be discouraged by the unwillingness of the debt collector to do anything for you. You are playing to another audience – a judge you have yet to meet.

The positive side of dealing with student loan collectors can be that while they will call and bug you interminably, somebody in the collection department usually does seem to take notice of the *actual* financial reality you are facing. If you tell them that you do not have the money to pay, they will often – even usually, it seems, refuse to agree to partial payments - but then they often don't take any type of collection action, either.

We do not know and are unaware if anybody does know what percentage of student loans get sued on – we do not think it is a high percentage, though. The downside here is still significant, however, as the information will end up on your credit report and cost you that way, the debt hangs over you, and eventually the lender very well may sue.

Why Take Action if You Can

Unpaid student loans put a "cap" on your future, and as with other types of debt, student loans that cannot be paid take on an "unreality" in the mind of the debtor. That unreality of debt can mess up everything else in your financial life by affecting the way you look at other debts as well. You figure that if they insist on $1,000 payments and you can't pay that much, it's not worth making any sort of effort to pay anything at all (and sometimes they tell you that). At times, owing a thousand dollars can seem to be as far beyond your reach as owing a million, but it is NOT true.

We urge you to fight this tendency – you will *always* pay for what you get. You will pay full price, too – it's just that a lot of times that price is paid in despair, depression, anxiety, (lack of) social success, and bad sleep, among other things. You must never let the debt seem unreal, because it is always real. And if you have a large student loan, you have to fear the debt collector swooping down on you and taking anything you ever do get.

Getting Past Past Mistakes

On the other hand, if you do spend some time ignoring your debts or doing things that do not move you towards paying them off, it is probably worth straightening up and doing your best to fix that. Historically, as you will see, the courts have been quite harsh in the way they have viewed any economic "mistake," but they have gradually moved towards a more forward-looking approach that looks at whether it is possible, based on where you are, to make the payments.

Although we are not aware of any case directly focusing on choices that might be regarded as immoral, we believe that as the courts have begun to focus more on the practical question of whether the person can make the payments in the future, they have also focused more on the conditions existing at the time the case is heard rather than the distant past. In other words, we believe you can repair the damage made by prior mistakes or bad decisions.

This is consistent with the language and purpose of the bankruptcy law. It is pretty much a given that If you are in bankruptcy (and if you aren't, too) you will have made some economic mistakes that hurt you, but perfection is not a requirement for those seeking bankruptcy relief. As one court put it, mistakes made in the past are forgiven in bankruptcy, it's the choice not to maximize present options that constitutes bad faith. See, In re Bene.

Communicating with the debt collectors

Communicating with debt collectors is tricky. As we've pointed out, you want to give the impression of fairness and seriousness about debt obligations, and you do not want to look sneaky or uncooperative. On the other hand, the debt collectors are sneaky and uncooperative, and if you tell them financial information such as where money or job assets are, you put yourself at risk.

In fact, their having that sort of information makes being sued more likely. Every lawyer suing debtors has one thing on his mind: getting paid. When they see you have a bank account they can reach or a job they can garnish, you make the risk of not getting paid smaller. And if they sue and get a judgment, they can raid accounts or garnish paychecks whenever they want and without warning.

Make no mistake: your attempts to cooperate with them or to make "partial" payments does ***not*** make them suing you less likely – a judgment is much easier for them to handle. Protecting yourself and not giving them the information that would reduce their risk of losing money by suing you ***does*** make them less likely to sue you. That's because lawyers, who will be handling the lawsuits, like to win and collect money. They are often reluctant to file suit when they don't know if you have the money to pay for their efforts.

In the next chapter we will discuss how the law works in the cases where student borrowers seek bankruptcy protection from their student loans.

IV. Bankruptcy and Student Loans

When your student loans reach a certain point, you may believe that repaying your loans is simply impossible. Before attempting bankruptcy, you might ask the lenders just to forget about it or to "forgive" (let go) some part or all of the remaining money due. There is no harm in trying this, but we have never heard of it working.

In fairness to the lenders, they probably *couldn't* forgive guaranteed loans if they wanted to (not that we've ever heard of them wanting to). They can't just forgive the loan because student loans are always guaranteed by someone – the school, the government, a co-signer – at least someone. As should be clear from our talk about co-signers, someone has a right for the lender *not* to forgive the debt, since the student getting off the hook always means that someone else is going onto it.

For private, non-guaranteed student loans, it might be possible to have some simple debt forgiveness (part or all of the debt is just extinguished) in the same way other debt collectors sometimes negotiate away larger payments for easier and more immediate payments.

There are sometimes helpful things the creditor can do short of forgiving the loan – they can freeze interest, "defer" payments (which means, if the loan doesn't start adding interest until the payment period begins, that you don't pay interest while you are waiting to be able to start paying), or "forbear" payments (which means not requiring payment, but interest continues to add up, so it costs you). You should try everything. There is absolutely no penalty for boldness in asking, and "asking" means to ask for it repeatedly from lots of different people. Remember, they're trained to say "no" first thing, and it may take some time to work your way up the list of people to find someone who even has authority to change your debt. You should try this, and you should make and keep a record of your efforts.

These efforts go a long way towards showing the "good faith" the courts require even if they do not result in cooperation from the lender – and sometimes they might work that way, too.

Eventually, many people reach the end of their ropes and seek help in the bankruptcy courts. And this is where they get their rudest surprise. ***It's hard to get rid of a student loan debt*** – harder than almost anything else. We're going to discuss the bankruptcy rules for both students and co-signers, and we will discuss some surprising study results that suggest how you might deal with the rules. Bankruptcy may seem to be a logical option, but it isn't always so easy. In fact, whether you are the student or a co-signer, getting rid of student loans in bankruptcy is a very doubtful and difficult process. This chapter is about your rights when that happens.

A General Introduction to Bankruptcy for Student Loans

For someone new to the question of bankruptcy, the basic "trade-off" provided by bankruptcy is that, in exchange for all your assets (a "chapter 7" bankruptcy) or an agreement to structure your finances in a specific way (chapter 13), you will be allowed to walk away from your debts after a relatively short period of time. Eliminating the debts without full payment is called "discharge," and in most situations in bankruptcy, you will leave the bankruptcy process with all your debts completely discharged. That is the point of bankruptcy – to give you a "fresh start," and the process is largely mechanical for almost all your debts, but not for student loans.

For Chapter 13 bankruptcies, you will submit a plan to the bankruptcy court that includes your items of income, a list of your debts and your expected expenses as well as a proposed payment schedule. The bankruptcy can remain open as long as five years to allow you to make payments in order to reach the amount you have proposed to pay to your creditors.

For purposes of this discussion, you have three different kinds of debts: unsecured (like credit cards or other loans not "secured" by specific collateral (property)), secured debt (debt – like a mortgage or car payment – that could be foreclosed on and the collateral taken away from you) and student loans. You will need to pay most or all of the amount due on the secured debt (in order to keep the things securing your secured debt), while the payments on your unsecured debt will probably be only a small fraction of what is due. Your student loan payments are also treated differently.

The court will look at the payments you are making on your plan – both the payments you make to creditors and your living expenses, and will accept your plan or not. At some point toward the end of your Chapter 13 bankruptcy, it will be clear as to how much money, if any, you will have to pay student loans going forward. At this point, if you want to try to get rid of the student loans, you will need to file an adversary action, which is a sort of mini-lawsuit to determine how much of the student loan you will have to pay.

If you are filing a Chapter 7 bankruptcy, you will skip the plan with expenses and will, instead, turn over your assets and list all your debts. Then you will file an adversary action to determine your student loans going forward – they are not considered a "debt" in the sense that your other debts are considered but are taken separately.

Nondischargeability of Student Loans

The general rule of bankruptcy for *student loans* is that they are "not dischargeable" unless ***failing*** to discharge them would result in an "undue burden." Here's the specific language of the bankruptcy law:

> §523. Exceptions to discharge
>
> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> …
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for— (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;
>
> ….
>
> U.S. Code Title 11, Chapter 5

Student loans are treated differently than (most) other debts.[15] They are only supposed to be discharged if forcing you to pay would be an "undue hardship," a term that was not defined by statute and has been defined in various ways by the courts. Rather than liquidating the loan and considering the total, as would happen with a business loan, the courts tend to look at each loan payment stretching off into infinity as a sort of separate debt.

They are reluctant to allow you not to pay your distant payments because they don't know whether or not you will be able to afford them several years down the road, and they don't want you getting off the hook unless you would actually starve to death if you did have to pay them (this is only a slight exaggeration). Thus the courts are perfectly willing to do a long-term analysis of your future prospects, making lots of absurdly optimistic guesses about what you will be able to do and to require you to make payments *now* based on these future prospects – although this, too, is contrary to the spirit of bankruptcy, which normally involves an inability to make payments. The burden of proving "undue hardship" is on the debtor, and this means that the rules of evidence often play a decisive role against the student.

In addition, although it is typical for the bankruptcy to discharge most of your debts completely (upon payment of a certain part of them), the courts do not like to do this with student loans. To avoid either the excessive hardship of completely denying discharge of the student loans or the excessive generosity (so to speak) of completely discharging student loans without too much suffering, the courts have developed the concept of "partial discharge."

For present purposes, you should be aware that courts sometimes discharge some *portion* of a student loan payment. Thus, you could enter bankruptcy with a student loan payment plan of $800 per month, and the court could decide that payments over $400 would be unduly burdensome and should be discharged. We are hesitant to suggest a loan consolidation plan that lengthens payments as part of your attempt to make your payments if you are severely stressed (financially) unless you can see how you will make the payments. Doing so will lower the amount of student loan you are seeking to have discharged and increase the amount of time you must continue making payments. Sometimes this could be the right thing – but sometimes not. If you have so little income that you would not make any payment under the ICRP program for the foreseeable future, we would suggest that you should probably ***not*** sign up for the plan.

These court holdings and methods (the partial discharge and the *Brunner* test), while very common, have not been tested in the Supreme Court. And while they make sense on some levels, we are not fully persuaded that they *would* survive Supreme Court analysis. Saddling a person with a long-term student loan following the full satisfaction of all conditions for bankruptcy definitely denies the bankrupt person the "fresh start" promised by bankruptcy. The Supreme Court could decide this is an unacceptable deviation from the language and purpose of the Bankruptcy Act – and we believe it should. By the same token, the Supreme Court has not adopted the Brunner decision or its variations. That test has significant problems, in our view, and it should be rejected because of the way the "good faith" test has been applied and continues to be applied in many jurisdictions.

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[15] What constitutes a student loan is defined by statute, and there are technical requirements, but in general, the lenders make very sure that anything that would be called a student loan would fit the definition (on the other hand, if it isn't *called* a student loan, it probably isn't one).

On the other hand, Congress has acted many times since *Brunner* was written (and since the concept of partial bankruptcy was introduced), and it has impliedly allowed them to continue by not changing the law. Sometimes the courts take this as a sort of endorsement of the law as interpreted by the lower courts, but this is not *necessarily* decisive. In addition, congress has been quite vengeful towards people unable to pay their student loans off, repeatedly making the law harsher and harsher. Congress appears to be satisfied with the havoc they have wreaked – but whether the Supreme Court will be remains to be seen, and of course congress itself can change if that become politically necessary.

We believe, therefore, that the practice of treating student loans as a stream of independent payments rather than one liquidated debt, and the practice of allowing for (requiring) partial discharge rather than complete discharge, and above all the *Brunner* test itself are not necessarily truly established in the law. They remain live issues to be raised if it makes sense to do so.

What Are Your Chances?

You may wonder what your chances of getting your student loans discharged are, and unfortunately there are no definitive statistics available on that. The test is certainly designed to be difficult, and it appears that most people think it is: from the sources we have seen it seems that less than one percent of the people filing *bankruptcy who have student loans file the adversary action* necessary to get these loans discharged. In other words, almost nobody even tries to get their loans discharged.

Whether this is because of simple ignorance or over-intimidation we do not know, but ***we are certain that more people could get their student loans discharged than try to***, and there is little reason not to try. Of those who *do* try, somewhere ***between 30 and 60 percent succeed*** in getting at least some part of them discharged. We apologize for the uncertainty again, but there are various studies with different numbers, so we don't know what to believe. ***In any event, among those who attempt to get their student loans discharged, the success rate is pretty high – it's definitely worth trying, and there is no real down-side to trying.***

Co-signer

If you are a co-signer (not the student), *a small minority of courts have read this language (the bad part that prevents the discharge of debt) as applying **only to the student**.* For a full discussion of this, including a partial catalog of cases showing their differing opinions on the issue, *See Appendix B*. If you are in a jurisdiction where the court has declined to apply the undue hardship test to co-signers, we suggest that you raise the issue as a starting point for negotiations, but our reading of the law is that this more forgiving approach might very well not survive a determined challenge.

Not a Co-signer

Suppose you are not a co-signer, but have in some other way agreed to repay the debt (or had someone agree to pay yours)? Will *that* debt be dischargeable? Probably. See Appendix B for a discussion of the issues raised in ***Corso v. Walker, 449 B.R. 838 (W.D. Pa 2011)(in appendix)***, where a woman had agreed in a divorce settlement to pay certain student loans that her ex-husband had signed for their children. She filed a Chapter 13 bankruptcy, and the court discharged the "debt" (her obligation to her ex-husband to pay it), leaving him on the hook for the debts to the schools.

For the rest of this part of the discussion, as we go into exactly what you will need to show in order to get your student loans discharged, we will treat students and co-signers exactly the same.

"Undue Hardship"- The Bane of those Owing Student Loans

As shown above, the courts are not to allow a student loan to be discharged in bankruptcy unless keeping the student on the hook would result in "undue hardship." Since

(1) taking out a loan implies a willingness to spend some time with less money in order to repay it, the courts start with a high standard of what constitutes "undue hardship." And
(2) since students are often young and have a long productive life ahead of them, the courts do not regard a long – or even a very, very long – repayment schedule as "undue." Finally,
(3) because the education is presumed to have benefited the student for his or her whole work-life, regardless of whether the student has (or even ever *could* get) a job or career based on that education, the courts treat the benefit of the education as continual throughout the student's life.
(4) Finally, the courts have read a "good-faith" test into the term "undue" and in many cases have ruled that no hardship that was caused in whole or in part by the judgments or misjudgments of the debtor was "undue." For these courts, if you made a mistake or did something bad, no matter when, you deserve whatever hardship the debt might cause you.

Thus the net effect of this language is to make it nearly impossible, seemingly, to get the loan discharged.

It is not uncommon for courts to require a bankruptcy plan that contemplates the debtor having $100 or less per month left over after payments on a student loan lasting twenty or thirty years into the future. *In other words, the courts seem perfectly willing to saddle the holder of a student loan with thirty years of payments that leave them essentially broke and on the very edge of poverty.*

We regard that as a travesty because it completely negates the purpose of bankruptcy for those saddled with student loans. Bankruptcy was intended to give those without money and saddled with debt obligations a "fresh start." Decades of near-poverty are nowhere near a "fresh start," and a lot of people will likely go "off the grid" (into some sort of hiding) to avoid making repayments that leave them in such dire conditions. The only other kinds of debt treated this way, other than domestic support, are essentially wrongfully acquired debts, so one might wonder why student loans, regarded as so wonderful by everybody, are treated almost uniquely among debts.

However, we discussed our feelings on this issue above, and in this section we will be more results oriented. More importantly, some judges have asked the same questions and raised the same issues as we do here, and it appears that the law is slowly moving in a more merciful direction.

Remember, too, that judges are people, and although they may be a hard lot, they will often have feelings that forcing an unwise student into a life of poverty is not a good thing. They are also somewhat *more* likely to sympathize with a parent who has co-signed a loan on behalf of a student than the student him or herself. Our experience with judges is that ***if*** you can win the battle for a judge's heart, the judge will find a way to make your situation better (and vice-versa: if you lose it, look out).

The way a judge helps you is not always reflected in the written decisions by the court, and in part this may explain why it is so important to have a highly experienced bankruptcy lawyer representing you. It *probably* explains why the data seem to show that a lot of people do obtain debt relief despite a seemingly impossible legal burden.

The Legal Standard: Proving Undue Hardship

As we have already said, what a person seeking discharge of student loans must prove (or get everybody to agree to) is that *not discharging* the debt would be an undue hardship, and the tests for this, as you will see, can be arbitrary and unpredictable. But there are some procedural-type things which are much clearer.

1. Filing a bankruptcy action and listing your student loan does not automatically result in the debt being discharged;
2. To get student loans discharged, the debtor (person in bankruptcy) must file an "adversary action," which involves serving the lender with a lawsuit;
3. Normally, the time to file the adversary proceeding will be after the other debts are discharged, although this is not necessary. What is necessary is that the picture of your post-bankruptcy life must have already become clear (so that you can say with some certainty what your bills and income will be);
4. The debtor has the obligation to prove each factor of whatever test is necessary to establish "undue hardship," and the burden of proof is the simple "preponderance of the evidence" (which means the court must believe it is "more likely than not");
5. Evidence generally cannot be "speculative" or "guesswork," which means that if the evidence is not strong enough to show something (that you won't be able to work for a long time in the future, for example), you will lose. This is why expert medical testimony can sometimes be important. Click here for a discussion of the need for expert medical testimony.
6. Because of the burden of proof and the rules of evidence, it can be quite difficult to prove undue hardship with the degree of certainty required by the courts. This favors the debt collectors and is a large part of why they always push for the *Brunner* test, which requires more things to be proven by the debtor.

These things are all pretty well established in the law. Regarding the burden of proof, however, we would suggest that as a practical matter how much proof is required can vary according to the particular judge. Some of them require much more than others. Some seem to be quite compassionate.

As we mentioned above, many courts have adopted the "*Brunner test*" and have used that to deny virtually everybody attempting to discharge educational debts. We will call this the "traditional" approach because there are beginning to be *some* cases that apply the standards more fairly and liberally.

These latter cases we will call "new" cases because they seem to reflect an increasing awareness and sensitivity to the plight of student debtors. We will discuss these cases in more detail below. The "new" cases are not always actually newer – they reflect a fresher approach, however, in our opinion, and there is a movement in that direction overall.

Traditional Cases

Brunner

In re Brunner, is probably the most "traditional" case of all, since so many other judges have used the decision as a starting point in their analysis. In *Brunner* the Second Circuit announced a test that, while reasonable on the facts before the court, has been used to justify some almost incredibly harsh and bad results. Adopting the test on a widespread and required basis has been a terrible and unjust mistake.

The facts in *Brunner* are relatively simple. Marie Brunner obtained an advanced degree and then had some trouble finding a job which disturbed her perhaps to the point of some mild depression (the evidence was light, and Brunner herself testified that she was basically okay and able to work). Even before the due date for the first payment she would have had to make, she filed for bankruptcy and attempted to get the debt discharged. She may not have been the poster child for students attempting to unload their debt prior to beginning lucrative careers, but she looked like it. The bankruptcy court actually *did* discharge the loans (based in part upon her "disability"), but on appeal the district court reversed (finding, among other things, no evidence of disability or significant impairment); the Second Circuit affirmed (upheld) the district court and adopted the test the district court had created.

The crux of the difficulty of the courts dealing with students is, how much hardship, and for how long, is "undue?" The *Brunner* court put it this way:

> The effect of these requirements is to make student loans a very difficult burden to shake without actually paying them off. While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program. When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders, who may, after investigating their borrowers' financial status and prospects, choose to deny as well as grant credit and may adjust the interest rate which they charge according to their judgment as to the likelihood of repayment. The government has no such luxury. It offers loans at a fixed rate of interest, and it does so almost without regard for credit-worthiness. Indeed, because it bases its loan decisions in part on student need, it arguably offers loans selectively to the worst credit risks.
>
> Because of this enlightened social policy, those whose past work or credit record might foreclose them from the commercial loan market are able to obtain credit at subsidized rates to advance their education. Those who might obtain loans only at exorbitant rates are similarly able to obtain low cost, deferred loans. In return for this largesse—and it is undeniable that guaranteed student loans have extended higher education to thousands who would otherwise have been forced to forego college or vocational training—the government exacts a *quid pro quo.* Through § 523(a)(8) it commits the student to repayment regardless of his or her subsequent economic circumstances. In return for giving aid to individuals who represent poor credit risks, it strips these individuals of the refuge of bankruptcy in all but extreme circumstances.

That certainly puts the policy in the best possible light. It does allow people who might otherwise be unable to get loans to get them, and to that extent it is "enlightened." But we have already pointed out the disastrous consequences of relieving the universities of economic pressure to provide an economically justified product, or the students of demanding one at a realistic price.

The district court adopted a standard for "undue hardship" requiring a three-part showing:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
(3) that the debtor has made good faith efforts to repay the loans.

Applying this standard, the court found that Brunner, who had a master's degree in social work but had been unable to find work – despite her lukewarm efforts – had not shown extreme circumstances.

It seems like a just result, although this is not to say it was without its difficulties for Brunner.

In any event, in the early days of the law, the bar to discharge only lasted five years. With that as a limit, barring discharge except for extreme situations made sense – the suffering was limited to five years. As one judge put it, "dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *In re Briscoe*, 16 B.R. 128, 131 (Bankr.S.D.N.Y. 1981)."

Then the limit was increased to seven years, and now it is unlimited. This means that a standard that was appropriately difficult to achieve for a **few years** ("certainty of hopelessness") is now, as in ***Hixson*** (below), being applied for *decades*. *Nobody* can really show a "certainty of hopelessness" for decades; such a requirement guts the bankruptcy law completely.

One *could* argue that the change has made the rigid application of *Brunner* obsolete – we're no longer talking about a relatively short period of hardship that must be endured, so the amount of hardship should go *down*. The more popular argument has been that because congress no longer allows for the routine discharge of student debt at all, it intends the law to be harsher and more restrictive.

Congress itself has never addressed the question, so the courts adopt whichever one suits the result they want to reach. Perhaps they should attempt a new formulation. What appears to be happening gradually, as we will discuss below, is that some courts are not willing to be as harsh as the law appears to require. People do get student debt discharged sometimes, and possibly even more than half the time.

The *Brunner* test has routinely been applied to cases where the loans were already over ten years old at the time of the bankruptcy – where they had long been inflicting tremendous damage on the psyches of the debtors – as well as to loans with payments extending a decade or more into the future. We discuss the *Hixson* case, for example, where the court cheerfully decreed that Hixson must spend the next *thirty* years of his life in near-poverty – after having spent the ten years prior to the decision in that condition. Nor was that decision, heartless as it was, unusual.

In these situations, the unforgiving *Brunner* test simply negates the "fresh start" policy of the bankruptcy law.

In re Bene, 474 B.R. 56 (2012), although it reaches a compassionate result (and we point to it as an example of an enlightened way of seeing a debtor's history), is a good example of what is wrong with the *Brunner* analysis in some ways. In that case, the court states that, "[t]o some extent, this case is about choices that student loan debtors made long before seeking discharge of student loans in bankruptcy court….Ms. Bene never chose to be poor; never chose to leave a good-paying vocation for higher education that was not sufficiently profitable; never got a degree or diploma, because she chose to care for her parents and sacrificed the education that she borrowed-for; paid on the student loan debt what she could for 25 years,…" In re Bene, 474 B.R. 56, 57-8 (2012).

In short, the judge ***liked*** Ms. Bene and the sacrifices she had made, and the way she had spent her time, while it disapproved of the life choices that the other people seeking to discharge student loans had made in some previous cases. The bankruptcy provision *Brunner* analyzed was designed to be ***forward*** looking. What the judge hearing the *Bene* case had done in the previous decisions it reviewed was look at the "undue" part of the *Brunner* test and use it to justify an essentially moral, rather than legal, analysis of the *lives* of the people seeking discharge.

The *Bene* decision changed that and declared that bankruptcy forgives previous decisions, and the good faith analysis should be applied to bankruptcy-based decisions the debtor was making. We analyze this decision at length in Appendix C, and you should read this analysis if you have made choices in the past that affect your ability to pay your student loans (if you are seeking discharge for reasons other than health-induced problems).

As the court in *Brunner* itself noted, there was no textual support for the "good-faith" analysis in the bankruptcy provision itself, and we would argue that, where the life decisions of the bankrupt, however unwise or even foolish, do not amount to an attempt to evade payment of the loans, then the hardship is not "due." To allow the courts, under the pretext of analyzing what constitutes an "undue" hardship, to apply their own lifestyle choices in a moralistic sense, is to turn the law into an arbitrary and unjust system. The courts should stop following the test and should, instead, apply a test that forces them to apply the law in a more objective way. You should make that argument, but the "traditional" approach is essentially a moralistic approach by the judges resulting in arbitrary decisions. If you are in a court applying that analysis, you will need to take particular care in formulating your previous decisions in as morally favorable a way as possible. And you will need to keep that test in mind as you make decisions prior to filing bankruptcy if you have not already filed for bankruptcy.

In re Hixson v. U.S. DOE, 450 BR 9 (Bankr. SD NY 2011)

One case that demonstrates how heartless the courts can be in applying their rules to student loans is *In re Hixon v. U.S. Department of Education*, which we address at length here because there are important lessons for others in the case. In that case, John Hixon applied for bankruptcy protection and was denied any relief whatever. The court seemed to regard Hixon's income – approximate $40,000 per year after taxes in New York – as really all that needed to be considered.

If you are considering student loans, you should look carefully at *Hixson*. Consider the facts.

The Facts of Hixson

(1) Hixon graduated from the Julliard School of Music with a PhD in 1998 with a debt of **$91,566**. He studied the **clarinet**.

(2) Hixson's wife, Ulla Suokko, had a student debt of **$47,551**.

(3) Hixson and Suokko were married (date of marriage unknown).

(4) In **March, 1999**, Hixson and Suokko got a Consolidation Loan from the Department of Education. This loan provided for "joint and several liability" – that is, it made Hixson and Suokko both fully responsible for the total amount of the debt.

(5) Hixson and Suokko got divorced in **October, 2000** – 18 months after getting the consolidated loan.

(6) From June 1999 to December 2000, Hixson made 11 payments of $440 per payments. After that, he stopped making voluntary payments.

(7) From October, 2004, to November 2005, the **DOE garnished Hixson's wages** to the tune of $220 - $580 per every two weeks.

(8) *Suokko never made a single payment*.

(9) *The DOE took no collection actions against Suokko*.

(10) As of the date considered by the bankruptcy court, the debt balance was **$195,229**.

(11) Hixson was making approximately $3,255 per month after taxes, resulting in the court's determination that he had approximately **$1,250** left over after paying basic living expenses.

(12) Hixson faced payments of **$2,099** per month for ten years (total payments of **$251,934** assuming Suokko never paid anything).

(13) Alternatively, Hixson could use a plan to reduce payments. This would result in payments of **$808** per month for over 21 years (for a total of **$356,362**).

(14) Hixson worked in some capacity for an online marketing company. Obviously, this wasn't playing clarinet. It appears he was in some form of sales.

(15) The DOE was represented by the *U.S. Attorney*.

(16) The Julliard School of Music, which sold Hixson his degree, was not involved in this case at all and presumably got all their money and never faced any consequences for selling Hixson a degree that proved useless.

Hixson's Situation

When Hixson consolidated his loans with his wife, he became liable for approximately $50,000 more than he already owed, which was already almost $100,000. The marriage ended 18 months later, and Hixson was then stuck with *all* the combined loans he and his wife had. She never made a single payment, and the DOE never took any activity towards her at all. She got off scot-free.

As of January 12, 2007 – **more than nine years after graduating**, Hixson, on the other hand, faced either ten more years of payments that took almost twice his entire available income, or 21 more years of payments that took about half of his income. His Ph.D. in clarinet was obviously of minimal benefit to him in his career. His total payments were to total either $250,000 or 356,000 in addition to what he had already paid.

The guy had approximately $1,250 per month after paying for the most basic necessaries, was not in a career involving his studies (or involving them only tangentially), and faced 21 years of near-poverty. The court had no problem with that.

The court also had no problem with the fact that Hixson's wife never made a single payment – and that the Department of Education made no attempt to collect from her at all.

What the court had a problem with – the ***only*** thing it had a problem with – was the fact that Hixson had not continuously made payments voluntarily prior to seeking bankruptcy. Hixson argued that he had *let* the DOE garnish his wages (meaning, apparently, that he made no attempt to hide them or to change jobs and disappear), but the court rejected this argument. It held that because of Hixson's "bad faith" in not making the payments voluntarily rather than by garnishment he would not have been entitled to debt relief even if his conditions had otherwise been "undue hardship." Which the court held they were not.

Our Criticism

We don't know what the actual underlying facts of this case were and are just going on the stated record. Knowing these facts, however, it would not surprise us to learn that following the decision Hixson either changed jobs and commenced a long pattern of debt evasion, or that he had simply changed careers – or disappeared altogether. There would be little reason for him to do otherwise.

Consider how galling it must be for Hixson to know that the DOE chose *him* to pursue rather than his ex-wife, who has never paid anything. Of course, as the court pointed out, he *could* file a state law action against his ex-wife for "indemnification," but guess what – if he got a judgment against her for that, she could get rid of it in bankruptcy (remember the ***Corso*** opinion, mentioned above, which held that debts owed for other things than student loans could be routinely discharged[16]).

Unless the DOE decides to go after her, Hixson will likely get no relief at all – and the DOE's only motivation to go after her would be if he somehow stopped paying. Thus Hixson's only chance to force his ex-wife to pay any of her debt is likely to disappear and avoid payment. *Then* the DOE might bother with chasing her down and collecting from her for a while. The case result seems insane from a policy point of view – forcing a party to go "underground" in hopes of having a realistic shot at fairness or any hope for the future is simply bad social policy.

We do not believe the result was necessary under the statutory language, because we do believe that the actual results in this case were an "undue hardship." On the other hand, the logic of prior court opinions and the statute itself strongly pushed the court toward the result it reached. The Brunner test is not capable of evaluating the "hardship" involved in paying an ex-spouse's loans when the ex-spouse is off the hook thanks to the inactivity of the lender. In that sense, we have no real criticism of the court: what happened is what most courts would certainly have done. The DOE had a right, under the law of joint and several liability, to pursue whomever it chose, and Hixson was just, unluckily for him, the riper plum.

Our criticism is that the established analysis of "undue hardship" has become so rule-bound that it ignores basic human reality. It willingly subverts the entire purpose of bankruptcy and good policy and ignores what is actually an undue hardship in favor of some formula that a judge made up to help explain a completely different kind of case. Congress has idly sat by and let it happen because it is in the pocket of the lenders and universities – big money.

Lessons of Hixson

We trust that even the most casual reader see how dangerous consolidating loans with another person can be. Under slightly different conditions, the DOE could have pursued the ex-wife for three times what she borrowed and gotten similar results against her, reducing *her* to poverty and desperation for thirty or forty years instead of her ex-husband. The fact that there is not a strong lobby concerned about the rights of men post-divorce hasn't escaped us, and neither should it escape you: the DOE, like all political institutions, will target those it can target with the fewest political repercussions.

Note that agreeing to "joint and several" liability not only increased the total amount of the debt Hixson was on the hook for, but it also gave the lender near-absolute ability to screw Hixson for life – a power the Department of Education used *utterly ruthlessly*. It also gave Suokko (his wife/ex-wife) the power to screw him, too. As long as the DOE plays along, she can simply wait till Hixson pays the whole debt, then declare bankruptcy herself and get her debt to him discharged (remember the ***Corso*** case). Of course, many things could happen, and Suokko isn't in the most enviable position – she does have both Hixson with a claim against her and, if the wheel turns, the DOE after her. And she would be extremely hard-pressed to avoid the debt if the DOE *did* go after her.

[16] We have seen no cases precisely addressing this question, and we have some doubt as to what a court would hold. On the one hand, Suokko's debt would arise "out of" her status as a co-signer, but on the other hand the lawsuit would be for "indemnification" of that student loan. Whether it would retain its status as a student loan is questionable.

Note that Hixson's marriage lasted ***only 18 months after he signed up*** for the consolidated debt. It is possible that the consolidation was a desperate attempt of the couple to relieve their debt position; it may be that it just seemed like a good idea. The case should remind people that human commitments can be short-lived, but the DOE's commitment to extracting every last cent can be nearly eternal.

We trust that every reader noted that Hixson's Ph.D. was in clarinet from one of the most prestigious universities in the country for music. We love the instrument, but we have extreme doubt as to whether such a degree could ever be worth a damn in an economic sense. Performers perform, they don't spend ten years in academia. Hixson's degree was good for one thing (economically): teaching music at another university. This is too much like a Ponzi scheme for our taste, and we believe that the university ought to feel some of the pain when its students cannot get jobs. In any event, what happened to Hixson should at least be a warning to other students to know their options before going "all in." Ideally, their education should open up various profitable alternatives.

We call your attention to the numbers. Of course the debt in the first place was quite high – nearly $150,000 immediately after consolidation. Nearly ten years later, however, it was even more. At the date considered by the bankruptcy court, it was $195,000, and the date considered by the bankruptcy court was about **four years earlier** than the decision was issued. We don't know what happened to the total during the four years, if anything. The principle to keep in mind is a very simple one: missing payments causes the total amount due to rise – rapidly. This can happen much faster than you might suppose.

Here is a simple example using very rough calculations to illustrate the way this works.

Suppose you borrow $100 at 10% interest and you agree to make one payment per year. At the end of year one, you will owe $110. To make any progress, you must pay more than ten dollars (the interest); since it's a student loan with a 50-year maturity, your payment is $11. It isn't magic or fancy book-keeping. To make progress you must pay more than the interest, otherwise it gets added to the principle. Your $11 payment will reduce the total originally owed by only **one** dollar the first year – to $99.

Times are rough, though, so you seek and get a deferment of that first payment. At the end of year 2, you now owe $121. Your $11 payment will not make any headway on the principle, and you will in fact be losing ground. Even if you make all your originally scheduled payments till doomsday, you will still get further and further behind.

This won't happen. Instead, your payments will rise. After a few deferments or missed payments your payments will be significantly higher and will stretch out just as far into the future as ever. In other words, deferments in which the interest continues to run are extremely dangerous and are to be avoided if possible. If you renegotiate the deal (consolidating your loans, for example), you can possibly change the payments back, but you will do this at the price of increasing the number of payments unless you can get a lower rate of interest. Click here for a further discussion of this issue.

One final note about *Hixson*: we note that the Julliard School was not hurt in the least by any of this. They go on selling degrees that may, or may not, be worth anything at all (economically). They can keep their prices high thanks to the student loan program that makes it easy for the Hixsons of the world to get in and stay in, whatever the price. The university keeps all the money and pays no consequences for the destruction of its students, and this is true of all universities everywhere. Naturally, they won't be in any hurry to change things. Maybe you should be, however.

We are not "anti-academic," and we do, in fact, admire the students and mission of Julliard and other universities even though we regard them as enormously overpriced. Our point is that Hixson, like so many other students, was encouraged to follow his heart into music. He did so until he graduated, and then the rules of the game changed drastically. The rules *do* change; we just hope that Hixson gets his money's worth in other ways than financial, but for so many with student loans, this isn't much of a hope.

As we said briefly above, if you co-signed a student loan, you will probably be held to the same standard (when it comes to trying to get a bankruptcy discharge) as students would. For a thorough discussion of this issue, see Appendix 2, Co-signer and Non-signer Liability.

The Eighth Circuit "Totality of the Circumstances" Test

The Eighth Circuit has rejected the *Brunner* test because of its rigidity and unjust application. Instead, it requires courts to apply what it calls the "totality of the circumstances" test. The primary "technical" difference between the totality of the circumstances test and the *Brunner* test is that *Brunner* is done in analytical steps – which courts love. If you fail any one of the *Brunner* steps, the analysis stops, and discharge of the loan is forbidden, whereas with the totality test, in theory, the analysis continues. The real difference seems to be that the totality of the circumstances test looks at the ultimate issue of "undue" hardship and considers a wider variety of circumstances. See, Eighth Circuit law.

In practice, the test yields results much fairer to the student. This may occasionally be because a few more factors can be considered before judgment is rendered, but probably it is because it requires the court to engage in a more sweeping, justice-based inquiry. This allows a court to make supportive findings of fact which are harder to upset on appeal and offers a little less room for hiding the harshness of the results behind an antiseptic appearing test. The more debtor-friendly results do not seem to be truly logic driven, but the debt collectors always push as hard as possible for the *Brunner* test, so they certainly share the belief that the Eighth Circuit test is more favorable to the student.

If you live in the Eighth Circuit, you will want to model your adversary petition after the findings of the Eighth Circuit cases. Remember that the general inquiry is whether requiring you to make student loan payments is an undue hardship, so proof of hardship is required (obviously), although the Eighth Circuit has allowed people with pretty high incomes to avoid loans. In *In re Walker*, for example, the debtors had multiple late-model cars and had just spent approximately $50,000 on a screened in deck. In our opinion, *Walker* was an odd enough decision that it suggests some sort of trickery, but it is an example of what the courts will allow under the right circumstances at least.

The First Circuit adopted the totality of the circumstances test in In re Bronsdon, in 2010, in a move intended to bring about more compassionate results.

Newer Cases

ECMC v. Polleys, 356 F.3d 1302 (10th Cir. 2004)

The case in *E.C.M.C. v. Polleys* is a good example of how the courts have begun to try to take a little more compassionate view of the law. In our opinion, the Tenth Circuit, in adopting the *Brunner* test (albeit with modifications), failed to do enough, but the opinion did at least open the door in the Tenth Circuit for *some* better decisions.

Nancy Jane Polleys was the 45 year old mother of a teenaged girl. Polleys was working part-time, with small earnings. She and her daughter largely lived on food stamps, welfare, and her parents' generosity. She had student loans of approximately $51,000 that would require payments of $410 per month for 20 years that she had incurred in studying for a CPA – but she had failed the test and lost her work in accounting. She had various conditions of depression and was on strong medication for them; these helped stop the depression, but they made concentration and self-control difficult or impossible.

Polleys won at the bankruptcy court level and on appeal to the district court, and the ECMC appealed to the 10th Circuit. The ECMC argued that the lower courts had applied the incorrect test – the "totality of the circumstances" test of the Eighth Circuit, rather than the *Brunner* test.

The 10th Circuit nominally rejected the totality of the circumstances test, stating that the Brunner test encompassed these circumstances and was a better test. In applying Brunner, however, the court looked more closely at the second test – the one requiring that the hardship will last a long time – and stated that actual hopelessness was not required, that the condition only needed to be foreseeable. The court stated that "unfounded optimism" was not sufficient to negate that continuation of hardship. The court rejected ECMC's argument that Polleys needed to show actual, irrevocable, disability, stating only that such a disability would certain be a factor. Polleys's condition was clearly significant in the court's opinion.

The ECMC also argued that Polleys should have lost because she had failed to show good faith (the third *Brunner* test) – because she had never made a payment on her debt and had quit a job and changed states to live with her parents (rent free). The court rejected these arguments, finding that Polleys's consolidation of the debt, deferments, and then negotiations to attempt to get lower payments all constituted good-faith attempts.

Failure to make even a single payment was not considered bad faith – because unlike Brunner herself, Polleys had attempted to live with the debt and had not tried to declare bankruptcy immediately after payments became due. The court held that "the good faith part can be satisfied by a showing that Ms. Polleys is actively minimizing current household living expenses and maximizing personal and professional resources," citing, *In re Woodcock,* 149 B.R. 957, 961 (Bankr.D.Colo. 1993).

The court found no evidence that Polleys was attempting to game the system in any way. Thus it affirmed the lower courts.

A bankruptcy court, in In re Azwar, 326 BR __, BAP No. WO-05-005, BAP No. WO-05-006, Bankruptcy No. 04-13501-BH, Adversary No. 04-01150-BH, summarized the holding of *Polleys* as follows:

> in considering whether a debtor is maximizing resources, courts may consider whether a debtor has a legitimate inability to earn resulting from factors such as a disability or medical condition that prevents the debtor from maximizing income; whether the debtor has chosen a lower paying job in his or her field for personal reasons; whether work exists in the debtor's field or in any other field in which the debtor is capable of working; whether wages in the debtor's field or any other field in which the debtor is capable of working are low; and whether the debtor's skills are outdated and cannot be reasonably updated;[38]
>
> Is the debtor "willfully contriving" a hardship?;
>
> Has the debtor cooperated with student loan creditors by making payments, negotiating payments, seeking deferment, or seeking consolidation of numerous loans?; and
>
> Is the debtor "attempting to abuse the student loan system"?[41] As part of this factor, courts should be suspect of the debtor's good faith when a short period of time has lapsed between the debtor obtaining his or her degree and the bankruptcy filing, because § 523(a)(8) "was designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings."
>
> *In Re Azwar, 326 BR 165, 174*

While the *Polleys* case definitely brings hope to people in the Tenth Circuit, we believe that its adoption of the *Brunner* case still necessarily invites courts to engage in inflexible, moralistic, and heartless analysis that is very much against the whole spirit of bankruptcy. The decision in In re Buckland, 424 BR 883 (Bankr. Court, D. Kansas 2010)(supposedly applying *Polleys*) shows just how bad that can be. Other than wondering how some people can stand to look at themselves in the mirror, we will say no more about the facts of this case **other than to point out the extreme importance of finding a decent judge;** some of them are good, and some most definitely are not.

We also note that the Bucklands were pro se.

In Re Durrani, 311 B.R. 496 (B.R. N.D. Ill. 2004)

For a vivid contrast to the *Buckland* case mentioned above, consider *In re Durrani*, which we believe represents a more modern and compassionate approach despite its earlier date. **Of significant note, the plaintiff Durrani was *pro se***. So it can be done – even though we still hesitate to suggest it.

The bankruptcy court found that Durrani had attended Chicago State University from 1984 to 1993, graduating with a B.A. and an M.S. in Corrections and Criminal Justice, and loans totaling $24,682.00. After consolidating the loans in 1994, the total was $31,869. At the time of the decision, Durrani was on the faculty of Chicago State as “Academic Advisor” (one wonders what her academic advice will be) for a salary of approximately $36,000 per year. She was 51 years old and eligible for retirement in 2007 with a projected income then of about $1,000/month. She suffered from various disabilities, including diabetes and osteoarthritis in one knee. She had, and the court considered important, a permanent handicapped parking tag at Chicago State.

In its initial ruling, the court found that Durrani could pay the supposed payments of $331/month the lender claimed she would be eligible for under the Income-contingent Repayment Plan without undue hardship. Upon reconsideration, the court took a fresh look at the whole thing and came up with some interesting conclusions.

In the first place, Durrani had consistently tithed for a long time. The educational lenders argued that the income she gave her church should be considered part of her assets available for giving them. We discuss this issue below in our section on Special Issues. To put it briefly here, the court ruled that the money she gave her church was not to be considered in her income for purposes of hardship analysis.

The court noted that Durrani had made numerous payments on her loans and, as part of her bankruptcy proceeding, had paid off ten percent of the loan principle (the interest has continued to accrue with a vengeance, however) as part of her bankruptcy plan. She completed the chapter 13 plan, which the court considered a significant sign of good faith because only a third of people filing chapter 13 plans actually follow through with them, citing Ed Flynn, Gordon Bermant and Karen Bakewell, “A Tale of Two Chapters: Financial Data,” 21 AM. Kankr. Inst. J. 20 (October 2002).

The court found that Durrani had frequently called her educational creditors and attempted, despite their intransigence, to obtain better terms for her loan. The court found this a significant indicator of good faith. Likewise, the fact that Durrani had not sought discharge until after living with the loans for about twelve years (in contrast to Brunner, who had sought discharge within a month of the first payment coming due).

The court pointed out that although the *Brunner* court was supposedly an objective standard, the decision is “still ultimately at the discretion of this Court to use its ‘intuitive’ sense of what is a ‘minimal’ standard of living and what is ‘good faith.’” 311 B.R. at 501. The court noted that “recent” interpretations of Brunner had been less “formulaic.” *Id*. The court also noted the *Polleys* decision warning courts not to apply the *Brunner* standards so harshly that it prevented people from ever receiving a discharge.

Durrani had submitted evidence that she would not likely be obtaining a raise from the University. The court found that under the Income Contingent Repayment Plan, Durrani would have to pay between 390 and 395 per month. It considered Durrani’s age and prospective retirement income in finding that her chances of repayment would not likely go up during the repayment period for the loans.

The court had, in its first decision, been critical of several of Durrani’s expenses, but upon reconsideration took a much kinder look at them. It found an item labeled “credit card expenses” in her debt plan, for example, a permissible “contingent plan” for emergency expenses; and it considered her payment for a cell phone a safety issue considering where she lived. It must be noted that Durrani’s overall budget was quite modest, and it did leave over a hundred dollars undesignated at the end of each month. The way the court analyzed facts in Durrani shows again how important it is to give the court as sympathetic an explanation for expenses as possible, and to sell all life choices as much as possible.

The court found that despite the surplus Durrani could not maintain her minimal level of lifestyle if forced to make the educational payments despite this “left-over” money, noting that the first prong of Brunner asks whether, if forced to pay the loan, the debtor could maintain a minimal lifestyle, and not whether the bankrupt has any surplus income. This was probably more significant in a jurisdiction where there is "all or none" discharge, as we discuss below, than in a jurisdiction where the courts order *partial* discharge. In those jurisdictions, the courts seek to squeeze the last ounce of surplus out of the debtor's budget for the rest of his or her life, it seems. And this in turn brings up an issue we will discuss at length below, which is, how fair is a "partial discharge?"

The lender offered Durrani, during litigation, the ICRP plan, and it argued that her failure to "take advantage" of it showed her lack of good faith and that she was not entitled to discharge. As we discuss below in the special issues section, lenders often do this. They offer a plan that reduces the payment – sometimes all the way to nothing – but that hangs over the debtor's head for 25 years. At the end of that period, anything that has not been paid is cancelled.

It is our belief, and the court in *Durrani* found, that when the ICRP plan does not, as far as the judicial eye can see, contemplate reducing the debt, that it is not "bad faith" to reject the plan. This is because keeping the debt alive for so long is bad for the debtor in many ways, contrary to the "fresh start" provision of the bankruptcy law, and has drastically negative tax consequences when the debt is cancelled after 25 years. The *Durrani* court also held that the courts should not abdicate their responsibility to apply their discretion to the bankruptcy to the lending administration, and that holding that where an ICRP plan was available it was per se bad faith not to accept it. We discuss all these issues below in the Special Issues section.

In re Bronsdon, 435 B.R. 791 (B.A.P. 1st Cir. 2010)

The First circuit officially adopted the Eighth Circuit's "totality of the circumstances" test in In re Bronsdon, 435 B.R. 791 (B.A.P. 1st Cir. 2010). There was an opinion written by one of the judges who did not believe this was a case in which it was necessary to choose a test, but the judge who wrote that opinion nevertheless said he was "not a fan" of the *Brunner* test. It appears that the "totality" test will be followed, and in any event, the First Circuit made clear that it wanted a more compassionate result than was prevailing in the *Brunner* tests.

Procedurally, what happened in *Bronsdon* was that the bankruptcy court sided with the debtor and discharged the debts. The district court vacated the decision and sent it back ("remanded") to the bankruptcy court to consider the impact that participation in the IRCP proposed by the lenders would have on the analysis. Upon reanalyzing the numbers, the bankruptcy court again found undue hardship and discharge the loans. The ECMC appealed.

A crucial factor in *Bronsdon* was that the ICRP provided for a zero dollar payment at the time of trial and for the foreseeable future. In other words, Bronsdon's income was so low, and her prospects of improving it were so minimal, that the parties agreed there was no actually foreseeable likelihood that she would ever have to make payments of any amount during the 25 year repayment plan.

Nevertheless, the ECMC argued that her failure to sign up for such a loan showed "bad faith" in attempting to pay the debt – which would prevent discharge under the *Brunner* test. The bankruptcy court and appellate panel found that forcing a debtor to accept a repayment plan that required no payments for the foreseeable future, but which kept the debt in existence, would have been a judicial abdication of its responsibility under the bankruptcy act. The Act, as you will recall, requires discharge if payment of the loan would be an undue hardship.

“Payment” of zero dollars (as required by the ICRP for Bronsdon), would obviously not be a hardship, but then, payment of zero dollars is not “payment.” The court called this a “meaningless repayment plan,” but it was clearly aware of the *actual intended impact of the plan*, which was a blatant attempt to prevent bankruptcy from ever discharging student loans – to keep them in place for up to 25 years on the hope that payment would eventually be possible (or for some other bookkeeping reason). And the court noted the tax impact of the plan.

We will discuss the tax impact of the ICRP below (in the Special Issues section), but to put it briefly, the federal government treats all the debt forgiven at the end of 25 years as income. Bronsdon owed $82,000 for loans on a legal degree; she couldn’t pass the bar exam and, after working at various jobs, was living on a little under $1,000 per month Social Security. The court did not say what the likely total of 25 years of interest on an $82,000 loan would be, but it seems likely that it would be around at least $500,000. When that loan was finally “forgiven” by the ECMC, Bronsdon would be treated as having earned that much income in a single year. Most courts reviewing the question have stated that the income tax resulting from the forgiveness – well over$100,000 in Bronsdon’s case, would not be dischargeable at all.

The court found this was “the antithesis of a fresh start.” 435 B.R. at 801. The only amazing thing is how many courts have failed to reach the same conclusion. The court noted that “Congress has provided bankruptcy debtors relief which is not provided in the ICRP regulations. Compliance with ICRP regulations will not result in the same relief which can be granted by the courts under 11 U.S.C. Sec. 523(a)(8). The court noted that many courts were concerned that the ICRP would allow the Department of Education to substitute its administrative determinations regarding undue hardship for the bankruptcy courts’ mandated discretion.

Note that the court did not find that an ICRP payment plan of zero dollars necessarily meant that the loan should be discharged. It adopted the “totality of the circumstances” test and held that the availability and amount required by the ICRP had to be considered as a “circumstance.” In Bronsdon’s case, her age, work experience (or inability to find a job) and other circumstances all had to be considered as well. Thus, the result required by the *Bronsdon* court’s analysis may prove to be less beneficial than the tone of the opinion would suggest.

The case clearly stands for the proposition that bankruptcy courts have power to exercise their judgment, and that debtors should not be saddled with plans keeping the debt alive on zero-dollar payments. It is very significant, in our opinion, that Bronsdon won at the bankruptcy court level, and we view this as another decision highlighting the importance of showing up well at that level. It is also worth noting that the tone of *Bronsdon* is more compassionate toward the debtor – perhaps an indication that the courts are responding to the widespread hardship inflicted by student loans and worthless degrees.

Hedlund v. Educational Resources, Inc., et al.

The Ninth Circuit follows the *Brunner* case format, requiring minimal lifestyle, persistence of the condition, and “good faith.” One case that offers hope for people living in the 9th Circuit, however, is *Hedlund v. Educational Resources, Inc., et al., 718 F.3d 848 (2013)*. This case was significant because

Michael Hedlund, the bankrupt, had gone to law school and, when he could not pass the bar exam, settled into a middle class type job. He was not actually poor, but his loan payments of approximately $800 per month were unmanageable. Hedlund had made some payments and attempted consolidation and other negotiations – largely in vain because of the lender's unwillingness to negotiate and accept lower payments.

The bankruptcy court discharged all but $32,000 of the loans, which more than cut them in half. The district court reversed, holding that Hedlund had not shown "good faith," and the 9th circuit in turn reversed the district court and reinstated the bankruptcy court's decision.

The court began its analysis with a statement of the "good faith" rule:

> "Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." *Penn. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002)* (internal quotation marks and citation omitted). "Courts will also consider a debtor's effort – or lack thereof – to negotiate a repayment plan, although a history of making or not making payments is, by itself, not dispositive." *In re Mason, 464 F.3d at 884* (internal quotation marks and citations omitted).

The court of appeals found that the bankruptcy court had reviewed the significant evidence of Hedlund's story. It had found that Hedlund was "well-placed for his skill level" and that there were no better jobs available. It helped that Hedlund had shown that he'd applied for two higher paying jobs and been rejected. About his not practicing law, the 9th Circuit held:

> Noting that Hedlund had tried three times to take the bar exam, the bankruptcy court also found that Hedlund's failure to pass was not "within his control." **In any event, the court found no evidence suggesting that Hedlund could make a higher wage as a licensed attorney**. (emphasis added).

Next the court reviewed the Hedlund's life-style, and again, note that the court, while making certain adjustments, did not find a need to determine that Hedlund had shown "bad faith" despite the "extra" expenses.

> The bankruptcy court then reviewed Hedlund's personal budget, and concluded that certain expenses exceeded what was reasonably necessary to maintain a minimal standard of living. Specifically, the court found that Hedlund's clothing, recreation (including cable and internet), and "miscellaneous" budgets (including childcare and haircuts) could all be reduced. By contrast, the court found no fault with Hedlund's budget for two cell phones (given that the Hedlunds had a small child) and for the lease of a second car (given that the Hedlund's other car was older and unreliable). Taken together, the court found that the failure fully to minimize expenses did not "tip the balance away from a good faith finding" because Hedlund and his family "have always lived frugally."

Regarding repayment history, the court had this to say:

> Under these factors, the court noted with approval that Hedlund had waited four years before filing for bankruptcy and that he had, in that time, made a voluntary payment of approximately $950. The court also credited Hedlund for "endur[ing]," without challenge, sixteen and a half

> months of wage garnishments. [Contrast this to the court's finding in Hixson, that having wages garnished was evidence of bad faith.]
>
> With regard to alternative repayment plans, the court found that Hedlund had made adequate efforts to pursue one. The court noted that Hedlund had sought to consolidate loans, but that the lender had lost his application. The court also took into account Hedlund's offer to make an immediate payment of $5,000 in exchange for more lenient repayment terms.

The bankruptcy court did not fault Hedlund for rejecting three offers made by the lender, each of which would have required payments over $300 per month and lasted for 30 years – well into Hedlund's sixties, interfering with his children's own educational needs. Taking all of this into account, the bankruptcy court discharged "all but $32,000" of the loan.

Reasonable, maybe, but it still left a pretty heavy debt burden. Crucially, the bankruptcy court found a follows:

> Considering all of this evidence together, the bankruptcy court found that Hedlund's situation was not "self-inflicted" and that he had carried his burden of showing good faith.

The district court reviewed the good faith ruling "de novo" (meaning, without giving the bankruptcy court's finding any particular respect), reversed, and held the entire debt was nondischargeable.

It found that:

> while Hedlund had made sufficient efforts to obtain employment, he "ha[d] not used his best efforts to maximize his income or minimize his expenses." *Hedlund v. Educ. Res. Inst., Inc., 468 B.R. 901, 914 (D. Or. 2012)*. That conclusion was apparently based on the court's findings under prong one that some of Hedlund's expenses were "immoderate." *Id. at 910*. The court then found Hedlund's $300 per month exceeded the bankruptcy court's finding, on the first *Brunner* prong, of how much income Hedlund could devote to student loan payments.
>
> It found Hedlund's "lack of effort in negotiating a repayment plan" "even more vexatious." *Id. at 910, 915*. In that regard, the court felt that Hedlund was "less than diligent" in exploring the ICRP option, and it viewed Hedlund's $5,000 payment offer as unrealistic. *Id. at 915*. The court also faulted Hedlund for rejecting the three pre-trial repayment plans offered by PHEAA. *Id.* Finally, the court observed that Hedlund and his wife had chosen to live as a single-income family, "a lifestyle that few today can afford." *Id. at 916*. Thus, the district court reversed the bankruptcy court's good faith finding.

As should be clear, the district court's judgment was full of moralistic disapproval of every choice Hedlund had made – a common theme for the "traditional" bankruptcy cases.

The battle at the court of appeals level was over before it really began, when the court of appeals ruled that the good faith finding was not a "legal" question, but a "factual" one. Legal questions are reviewed by district courts (reviewing bankruptcy courts) and courts of appeal "de novo." Factual findings are, by contrast, almost impossible to overturn – they are reversed only for "clear error." When the 9th Circuit ruled that the "good faith" ruling of the bankruptcy court was a factual finding, it made such a ruling nearly impossible to overturn. **On the other hand, a court's ruling that the good faith was not shown will likewise be almost impossible to overturn, so the net effect was to increase the importance of**

winning at the bankruptcy court level. We also are somewhat skeptical about whether Hedlund will survive the test of time on this basis, as all the other circuit courts have held that "good faith" was a "mixed" question of fact and law that should be reviewed by the courts of appeal with more deference.

Here's how the court applied the standard, and note how tolerant the court of appeals is of the bankruptcy court's findings:

> There was considerable evidence showing that Hedlund had maximized his income, and the court properly declined to attribute Mrs. Hedlund's underemployment to Hedlund's bad faith. Although Hedlund had not fully minimized his expenses, the court permissibly interpreted the excess expenses as marginal. And **although we might have viewed certain expenses more skeptically – such as the new car lease and the two cell phones – the court's view of the expenses was not clearly erroneous**.
>
> The record regarding efforts to negotiate and to make voluntary payments is less favorable to Hedlund. Although he did submit a consolidation application, his efforts thereafter were minimal. His offer to pay $5,000 in exchange for a more lenient plan was at best unrealistic, and his research into ICRP eligibility could have been more searching. Hedlund has also declined to pursue the three revised repayment plans that PHEAA offered just before trial. Finally, in the four years prior to bankruptcy, Hedlund made only a single voluntary payment of approximately $950.12
>
> **Although this evidence could be interpreted to support a finding of lack of good faith, it was not so strong as to demand such a finding** (emphasis added).

We disagree with the disapproving language of the 9th Circuit, incidentally. We believe that the offer of $5,000, which had to be borrowed in order to make at all, was not "unrealistic" to hope for acceptance. After all, the debt collectors had been unable to collect, and Hedlund unable to pay, much of anything. There was an underlying practicality of necessity, you might say, and although the appellate court officially found it unpersuasive, you can be sure that this necessity strongly influenced the decision. That's probably why the court found the evidence "not so strong as to demand" a finding of bad faith.

Note also the court's mere tolerance of Hedlund's payments through garnishment and its mention of "only a single voluntary payment." Not attempting to avoid the garnishment was of some value – especially at the bankruptcy court level where it really counted – but actual voluntary payments, or attempts to make them, would no doubt be more compelling.

And note the court's holding regarding timing of the bankruptcy:

> Also weighing in Hedlund's favor is the fact that he waited four years from the beginning of his repayment obligations, during which period he was subject to wage garnishments, before filing for bankruptcy.

Thus again it is clear that waiting for some time – struggling with the payments at whatever level – is superior to filing for bankruptcy immediately.

Supreme Court Case – A possibility for Settlement

United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 559 US 260, 176 L. Ed. 2d 158

One of the most interesting cases out there is United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 559 US 260, 176 L. Ed. 2d 158 (2010), a decision by the U.S. Supreme Court. We believe this decision offers some hope to people suffering from student loans, although it will involve effort and sacrifice, as we will discuss in the next section.

In *Espinosa*, the student declared bankruptcy, provided notice to all the lenders, and requested discharge of student loans – also providing notice of the request to all creditors. The student ***did not seek an adversary proceeding*** to obtain discharge of the student loans, however. The court granted it anyway in the absence of opposition. Long after the court had approved the plan, and the student had paid off the agreed amounts, the lender sought to have the bankruptcy court's discharge declared **void** because there had not been an adversary proceeding.

The Supreme Court rejected the lender's argument. The Court found that the lack of an adversary proceeding, while erroneous (appealable) did not deprive the bankruptcy court of *jurisdictional power* to discharge the debt. Since the court had the power to rule as it did, its judgment was not void. The Court did affirm the requirement of having the adversary hearings, but it stated that a lender could not "sleep on its rights" of appeal.

The decision in ***Espinosa*** was not radical, by any means. Legally, it held that following the bankruptcy rules was not a jurisdictional requirement, which is exactly what anyone should expect, and it held that a lender who received actual notice of the decision, even if it did not receive that notice in the approved form, could not claim the court's ruling was unconstitutional applied to it. What was significant about the decision was a comment the Court made, that everybody could *stipulate* (agree in advance) to the facts necessary for discharge to occur.

This appeared to give the official stamp of approval to what very likely did occur in the *Espinosa* case, namely that the bankruptcy lawyer probably chatted with the lender's lawyer and informally agreed to have the debt declared dischargeable. If that is true, then they simply put this agreement into effect by having the lender's lawyer ignoring the proceedings and not filing either an opposition to discharge or appealing the decision rendering it. Under *Espinosa*, that agreement might need to be fully formalized – or it could probably still be conducted under the radar if practical necessity required or allowed it (remembering that there are several other entities involved in the student loans).

V. What to Do

In this part of the report, we discuss what we think people should so with what we know. The first part of that is surely obvious: the prospective part.

Students

We strongly believe that as a student, you must fight all impulses and pressures to under-evaluate the trauma of carrying loan payments of any amount whatsoever. We know from personal experience that they are infinitely galling even if you can afford them. Even if you are taking the loans for a profession that seems to offer good income possibilities, you must become, and stay, aware that those opportunities may take time to develop. Even if they do, things can happen to compromise them. And they do not always materialize at all. In other words, we suggest that you be extremely cautious in taking on any loan whatever.

We don't say that no loan could be worth having – we believe some are – but you must regard them as a business proposition from the beginning, making sure that every single cent is justified with the full knowledge that you will pay for every loan with after-tax dollars that you will probably *hate* to part with.

Co-Signers

Prospective co-signers have a tougher job. They must apply exactly the same analysis as students – first to the students, and then to themselves. They must resist the urge to "go along" with the student or to feel guilty about applying their own judgment and saying "no." One of the essential features of co-signing loans is that two judgments are applied, and both of them need to count. A co-signer must carefully analyze the prospects of the student paying off the loan, realizing how much misery this could cause the student. Then the co-signer must coldly and realistically consider the possibility that the student will not be able to pay the loan and what that would do to the co-signer.

Students cannot, and sometimes will not even want to, always pay off the loan. A co-signer must realistically prepare for the possibility that they will be the one paying the loan. As should be obvious from the cases above, it will be almost impossible to get rid of them without subjecting yourself to a long period of poverty or near poverty. There are thousands of cases in which things went wrong and dumped the co-signers into terrible conditions. Make sure you aren't one of them.

If You Are in Trouble

If you are in trouble, either as a signer or co-signer on a student loan, we suggest that you seek help absolutely *as early as possible*. The courts regard efforts to repay as critical to the "good faith" prong of the Brunner test, and nothing satisfies that test like making all your payments. If you cannot make payments, there are deferments and other ways to reduce the impact of the debts. As should be clear from the *Hixson* case, these deferments have a high price because the interest keeps running, but they are important to show the good faith requirement. So think of the deferments as a part of your exit strategy.

As you know, discharge of student loans in bankruptcy requires a finding of "undue hardship," and this is a test that, theoretically, is only satisfied by near poverty: "minimal lifestyle." To some extent, there is very little you can to avoid this. On the other hand, as we have said before, judges are people, and the more they like you, the less poverty you will have to show. In addition, the *Espinoza* case raises the real possibility that if the *debt collector's lawyer* has sympathy for you, you will also be able to show less poverty. You can get the other side to stipulate that some sort of partial discharge will leave you in dire enough conditions, and as we will show below, the debt collector's lawyer may take a more forgiving view of this than the courts would – for practical reasons, of course.

An interesting Study and Some Surprising Results

There is a group of academics in the state of Washington who study bankruptcy and have strongly advocated for a change in the bankruptcy law regarding student loans. Much as we have here, they have studied the legal standards for discharge, and they have, in addition, further studied a large group of people seeking discharge to see how often discharge actually occurs in the face of the harsh legal standard and what factors might account for those discharges that did occur. *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, by Rafael I. Pardo and Michelle R. Lacey.

The study showed that despite the *seemingly* insurmountable legal obstacles, many people actually do receive discharge – 57% of the people seeking loan discharge in the study obtained at least *some* discharge. The situation is much less hopeless than would at first appear to be the case, although very few of the people filing bankruptcy did try to get their loans discharged. Next, they did a statistical analysis to determine why, if possible, some people got discharge, while others did not: what were the factors that influenced their results? They were deeply unsatisfied with their findings on this.

Again to summarize, the study looked at numerous factors relevant to the stated legal tests for undue hardship. These included disabilities of various sorts, employment, size of the loan, and other similar economic factors that would indicate an inability to repay. They found that individually, *these factors seemed to have little to do with whether a discharge was granted*, but that the number of these factors present in a case did at least have a statistically significant correlation to discharge.

The researchers were more disturbed by the relationship between factors that did *not* seem to relate to actual ability to pay and discharge. For example, they found a strong correlation between **what judge** was assigned to the case and discharge, and also between discharge and

1. the actual **identity of the lawyers** who represented the bankrupt;
2. whether (any) lawyer representing the bankrupt had **over 25 years of experience**;
3. the identity of the lender;
4. how far along in the proceeding the case went – and specifically **whether the adversary hearing had been set** for trial or not (better results if not).

All of these non-legally relevant factors had stronger correlation to whether a discharge was obtained than the legally relevant factors did.

To the people doing the study, these results were profoundly disturbing because they indicated an arbitrariness in application of the test. This meant that tests were not really finding a consistent form of "undue hardship." They were doing something else. Because transparency in the law is essential to any real chance at justice, the study concluded that the "undue hardship" was intrinsically unjust.

We completely agree with that: there's nothing like abstract justice going on in bankruptcy as a whole. Let's take a little closer look at the study before drawing our conclusions, though.

Among the people they studied, 57% of the people seeking discharge actually obtained some reduction of their student loans, and in most cases the reduction was quite significant. Given the legal standards and the consensus belief that the standards were essentially impossible to meet, the percentage of discharges that actually occurred was **surprisingly large**. What we do not know is how similar to other jurisdictions these results are.

The test was conducted in the state of Washington. The bankruptcy market was dominated by two lawyers who obtained strikingly different results, and there was no analysis of their comparative talent or fees. We have some skepticism of the study for that reason. There were obviously only a few bankruptcy judges in the study, and so one might caution against overgeneralizing from the results on that account.

In the only other study of which we are aware, "An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard," *86 American Bankruptcy Law Journal 495 (2012)* (Jason Iuliani), the author reached different results. Here is the abstract of his article.

> [a]cademics have argued that the undue hardship standard for discharging student loans in bankruptcy is both unduly burdensome and applied in an inconsistent manner. By reviewing a nationwide sample of student loan bankruptcy disputes, this study shows that neither criticism is warranted. First, judges grant a hardship discharge to nearly forty percent of the debtors who seek one. Second, successful debtors differ from their unsuccessful counterparts in three important respects. They are (1) less likely to be employed, (2) more likely to have a medical hardship, and (3) more likely to have lower annual incomes the year before they filed for bankruptcy.
>
> The real failing of the student loan discharge process is lack of participation by those in need. Incredibly, only 0.1 percent of student loan debtors who have filed for bankruptcy attempt to discharge their student loans. … this Article's finding that a debtor does not need to hire an attorney to be successful. In fact, debtors without attorneys were just as likely to receive discharges as debtors with attorneys were.

Having surveyed the case law and read hundreds of cases, we are skeptical of the findings of Iuliani's study, to say the least. First, it is indisputably clear from the cases that the laws are applied in both an unduly burdensome and inconsistent manner. No study that finds otherwise is believable in our opinion. The courts have both formally adopted different tests (for example, the Eighth Circuit test vs. the *Brunner* test), and have applied those tests in radically inconsistent ways. No legitimate inquiry could conclude otherwise.

On the other hand, we take heart in the report's finding that nearly 40% of debtors who sought discharge got one. Like Iuliani, we find it "incredible" that only .1 percent of student loan debtors who filed for bankruptcy discharge attempted to discharge their student loans. In fact, we frankly do disbelieve this result and question the survey. We are also *extremely dubious* of the conclusion that pro se parties accomplished discharge as often as represented parties. These findings sound like the results of someone trying to prove a point, and we do not believe it.

Keeping the limitations of the studies in mind, we are not surprised by the factors that turn out to be important in discharging student loans. They reflect a "realpolitik" at play. The lenders hold all the cards in the legal game, but they are still very hard pressed to convert that winning hand into cash because their would-be victims simply don't have the money. And that means that the lenders are stuck in expensive litigation that can drag on for years without ever paying anything.

If the loans are declared nondischargeable, the lenders still have to try to find assets from people who don't have much and want to hide from them. It makes sense, in that situation, for the lenders to make a deal. It appears that they are willing to do so at least some of the time.

Suggestions

With all that in mind, we are able to make some suggestions to people who are struggling with their student loans and are considering bankruptcy.

Forum/Judge shopping

Given that bankruptcy decisions are often determined simply based upon where you are and who the judge handling the case is, it makes sense to shop for judges. How do you do that? Very simply, you move to the jurisdiction before you declare bankruptcy. You probably want to do this so that your motives are disguised, as judges do not appreciate being selected as "easy." Remember that courts will look at your move to consider it for motive even beyond the question of forum shopping – you need to have a legitimate basis for the move: greater opportunity, better family support, lower cost of living, or something similar.

How do you shop for judges? You can actually do a search of results in particular judge's courts. Unlike most other types of law, bankruptcy decisions are public and are not allowed to be kept secret by confidentiality agreements. This means it is possible to look at the results and analyze them by judge, lawyer and client-conditions, among other factors. Of course this would take a huge amount of time, but it may be that the data is compiled and kept somewhere. If your loan is large, you should try to make sure your chances of a favorable judge are as high as possible. The results will have an impact on you for a very long time. Knowing who the best judges are and getting them are two different things, though. If you are able to think and act far enough ahead for this to be a consideration, you will want to consult your lawyer about what you might do to increase your odds, at least, of getting a good judge.

Lawyer Shopping

The first study we cited makes it very clear that when looking for a lawyer, the specific identity, amount of experience, and tendency to settle cases early are all, individually, strongly correlated to better results. As we said above, these things are all public knowledge. That means, you should explicitly ask your lawyer about his or her results in other cases like yours. You should not accept any sort of hedging: bankruptcy results are completely public, and so the lawyer has no legitimate argument against sharing them with you, and you should check the truth of whatever answers you get. Yes – of *course* this takes time, perhaps a lot of time, although you can ask your perspective lawyer for the case numbers and names of cases and go down to bankruptcy court and spend a day going through the cases.

A successful lawyer will be happy to let you do this, because it is a strong selling point. An unsuccessful lawyer will look for ways to hedge his or her results. We recognize the difficulty and uncomfortableness of doing this analysis, but again we emphasize the importance of the results to you. If you have read any of the cases we analyzed, you know that the impact of your bankruptcy can last for over twenty years and result in near-poverty conditions. Spending the time to maximize your chances of a good outcome is an investment that will repay you many, many times in dollars, and much more in life satisfaction.

The first study we quoted found that lawyers having more than 25 years of experience was an important factor. The smallness of sample size may have affected that, although possibly not. We suggest you pay attention to the amount of experience, but the other factors – i.e., winning record and tendency to settle early might be better factors to consider. Experience and tendency to settle early may be indications that the lawyer is well-connected and respected; these things can result in more favorable results for the client in bankruptcy, which is dominated by back-room deals and "working things out."

Process Shopping

You can't shop for lenders this late in the game, and you can't really shop for early settlement in your case directly, either. But you can pay attention to your lawyer during the hiring process. A willingness to settle a case, early, is likely to show up very quickly in the interviewing process. The lawyer will probably tell you without your asking, and if not, will probably be very forthcoming about it. You must fight the tendency to believe that, just because the lawyer does early wheeling and dealing and ends the case early that he is not doing as much or as good a work for you. The study results show that **a tendency to settle early is a winning tactic**. A macho tendency to fight it out, on the other hand, may not be such a good thing, although again we are saying this based on a limited sample.

"Situation" Shopping and Selling

The final thing you must bear in mind is the way the courts look at what has gone before the filing for bankruptcy. You will recall the final *Brunner* test, the "good faith attempt to pay" requirement. Remember that this was intended as a way to prevent former students from immediately declaring bankruptcy after graduation. It also has its roots in the history of bankruptcy, which, as the courts delight in repeating, was intended to help "honest debtors, who through no fault of their own" ended up hopelessly in debt.

This test would not necessarily require a history of repayment, and indeed for most types of debt this test is essentially a formality, but in student loans, the courts look very carefully at repayment history and other factors indicating a lack of serious intent to pay the debt. Looking at *Hixson*, for example, you will note that the court went out of its way to find that Hixson's failure to make payments for some time, and then the fact that the payments he made were garnished, disqualified him for relief under *Brunner*. The statute does not explicitly support this sort of "morality" test, but it is quite common among the courts. That means that you must attempt to address it.

And that means that you will want to pay close attention to the way you justify and explain all your expenses and previous decisions. However bad they may seem, you will want to put the best possible spin on them. If you are in an expensive house, for example, you will want to justify the expense, if possible, in terms of school districts for your children. Courts always view expenses – previous and contemplated – for children with more sympathy than they do anything else. If your loan payment would cause unreasonable harm to your children in any way, you should highlight the fact for the court.

Most of the people reading this report will probably have missed payments. Does this mean you are completely out of luck? We do not believe so. Rather, it means that you must undertake some cosmetic repair – you must contact the lenders and attempt to make *some* payments. If they refuse to accept any payment that would not fully bring you current, you should send them a check for whatever amount you can afford. They probably won't take it, but you will have established your willingness and effort to pay.

They might take it – debt collectors often lie and always want money – and therefore you should regard their statement that they will not accept a payment less than a certain amount as merely a possible indication of what they might do. If they do, in fact, refuse the payment, put the money somewhere safe so that you can try again later, or so that you can offer some lump sum to the debt collector's lawyer when you are beginning the bankruptcy process.

Your goal here is two-fold. First, as we said above, you are trying to demonstrate your moral commitment to paying, and the courts have *all*, always, and everywhere, regarded partial payment as significant in that determination, regardless of the analytical test they happen to use. They regard attempted partial payments the same way. Always a good thing, with the added benefit that it doesn't actually cost you anything.

The second part of this plan, however, is that things change – and the first thing that changes when you either declare bankruptcy, or the lender sues you, is that the decision maker, as a practical matter, changes from a telephone harassment specialist to a lawyer who regards his or her time as valuable. The lawyer, as opposed to the telephone harassment specialist, may want and be able to reach some sort of compromise with you. Your attempts to reach a compromise with the lawyer will bear many fruits, both in the judgment of the lawyer and (later) the judge. A lump sum of payments that were, individually, denied, can look pretty impressive, as well. Remember that to a certain extent lawyers and judges are pragmatic and results oriented. Offering a larger amount of money is more impressive in their eyes.

Of course, you must find a way to hold onto all the money you have saved to pay toward the student loans, or you will simply be hurting yourself.

Credit Card and Other Unsecured Debt

Debt has an established hierarchy of value based on how hard it is to get rid of in bankruptcy. To an extent, taxes are the highest priority, but taxes that have been due for a certain length of time go down a little bit on that list and can be discharged. Debts obtained by fraud (and this can include gambling debts and, in some cases, reckless credit card use), are almost impossible to discharge. Next are student loans. This means that, absent some sort of criminal behavior, student loans are the hardest debts to get rid of. Debts on secured property (your house) can be discharged, but there are particular rules about whether you would get to keep the security (your house or car, or whatever is securing the loan).

Far below all these things are unsecured debts like credit cards. When you are in dire economic straits and considering bankruptcy, you should probably pay your debts in order of this hierarchy. This means, for example, that unless you have a very specific and powerful reason to do so, you must never make a credit card payment when you can't pay a student loan. The only type of reason that should change this rule is your immediate need to make a credit card payment in order to keep body and soul together – or to enable you to do something (something reasonable! – remember that gambling is considered fraudulent when you owe money) that will help you pay your student loans.

Because student loans are so hard to ditch, you must ditch every other bill lower on the hierarchy first. As comparatively easy as it might be to pay a credit card bill that would charge you 20% interest and result in almost immediate harassing phone calls instead of a student loan that only costs 9% and might not result in harassing calls if you missed one or two, you must resist the impulse. Credit cards are easier to defend in debt lawsuits, and they are far, far easier to discharge in bankruptcy. This is a rule to live by.

We suggest that if things start getting bad, and you begin thinking of bankruptcy, the sooner you go to a lawyer for advice about how to plan things, the better off you will be. Bankruptcy lawyers are plentiful, and that means that they usually offer that first conference for free

Pro Se and Desperate

As we said above, seeking bankruptcy discharge of student loans is a very large decision with an impact that will probably last ten or more years into the future. If you can cause a judge to reduce (through discharge) your payments by $100 per month, that is $1,200 per year, $6,000 over five years, and $12,000 over ten years. In *Hixson*, for example, a reduction of $500 might have been possible, and it would have possibly saved him approximately over $120,000 over the life of his proposed payments. With that in mind, how much would a good lawyer be worth? We suggest you consider this question carefully.

Despite the benefits and advantages of lawyers in such a situation, sometimes there simply isn't money. It can't be saved, borrowed or found under any circumstances. We urge you to try your hardest to get one. There are free lawyers for people with low enough incomes, though Legal Services, Inc., for example. If you can't, and if it looks like you simply won't be able to do it (it makes sense to wait a year or two while trying to save up), but if you can do the research to shop for courts and circumstance, then it might make sense to do it pro se.

Shop your judge and circumstances, file your bankruptcy, and initiate an adversary action against the student loan lender. You *can* do it all yourself – just remember that you won't be getting the advantage of an attorney-worked back-room deal. Instead, you will be sending a double message of poverty. We don't recommend it (obviously), but your chance will come because debt collectors want to collect money. In the final analysis, they do want money. If you can persuade them that the only way they will get it, they will probably make a deal with you.

Our site has materials that will help you with the legal process, and membership will help you get questions asked in real time, but again, we urge you to do what you can to obtain a lawyer rather than attempt this pro se. If you cannot, we will do our best to help you do it yourself.

Think Outside the Box

After reading hundreds of bankruptcy cases, we cannot help but be impressed by the similarity of most of the cases. Most of them involve disappointed expectations – some sort of surprise or bump in the road – or in many cases the simple disappearance of the expected road. Often what is involved is disastrous health problems, but quite often it is simply that the labor market is not cooperating, and the loans are big.

In many cases, one is left with the sense that the debtor just hasn't tried very many things. He or she was heading for a specific profession and then for some reason got untracked – or got into the profession and cannot manage to make money at it. The courts generally require (as a condition for student loan discharge) that you try other work than just what you wanted or trained for originally. Beyond that court requirement, though, we would encourage you to try different things if you are at all able to. It sounds like a cliché, but there really are lots of opportunities out there in the world.

We would suggest that you try things that would pay more or better, that would make you happier, and that might use skills you hadn't considered. Schools tend to channel you into one narrow direction, but… there are lots of other things out there that you could do that might work better for you. We suggest you keep your eyes and your mind open for that. No one is ever really happy with bankruptcy, although with enormous student loans hanging over your head it would be a relief no doubt. Whatever happens with that, though, we wish you luck in finding a way towards greater prosperity and security.

Remember that you can find help on our site at Your Legal Leg Up. We have materials that can help you with your litigation against any debt collector and a lot of information that you can access for free at the site or at @Fightdebt on Youtube.

Appendices

The following Appendices include actual copies of case opinions written by judges. We have no claim of right to them at all, of course, and simply attach them for your convenience. We found them using Google Scholar, and we include the link to that page. We have highlighted the cases in certain places simply to help point to things we consider important

We have an appendix for each of the 12 federal judicial circuits. It is our belief that if you follow the Google Scholar Link we include (bringing up the case) and then click on the "How Cited" link that you will find at the top left of the first page of the opinion, you have a good head start into researching your own jurisdiction's bankruptcy law.

We also include *Pelkowski* and *Corso v. Walker*, two cases involving liability for persons other than the "signer" of the student loan.

Appendix A – Circuit Court Decisions and Law

First Circuit Law

In Bronsdon, below, the First Circuit adopted the "totality of the evidence" test of the Eighth Circuit for student loan in bankruptcy analysis.

In re Bronsdon, 435 BR 791 - Bankr. Appellate Panel, 1st Circuit 2010

435 B.R. 791 (2010)

Denise Megan BRONSDON, Debtor.
Denise Megan Bronsdon, Plaintiff-Appellee,
v.
Educational Credit Management Corporation, Defendant-Appellant.

BAP No. MB 10-009. Bankruptcy No. 07-14215-FJB. Adversary Proceeding No. 08-01062-MSH.

United States Bankruptcy Appellate Panel of the First Circuit.

September 21, 2010.

793*793 John F. White, Esq., and Troy A. Gunderman, Esq., on brief for Defendant-Appellant.

Denise M. Bronsdon, Pro Se, on brief for Plaintiff-Appellee.

Before HAINES, LAMOUTTE, and TESTER, United States Bankruptcy Appellate Panel Judges.

LAMOUTTE, Bankruptcy Judge.

This appeal arises out of an adversary proceeding filed by Denise Bronsdon (the "Debtor") seeking to discharge her student loan obligations to Educational Credit Management Corporation ("ECMC") on the grounds of undue hardship pursuant to § 523(a)(8).[1] The bankruptcy court initially concluded that repayment of the student loans would impose an undue hardship on the Debtor and discharged the loans.[2]On appeal, the U.S. District Court for the District of Massachusetts (the "district court") vacated the bankruptcy court's decision and remanded the matter to the bankruptcy court to consider the impact that participation in the William D. Ford 794*794Federal Direct Loan Program (the "Ford Program") would have on the undue hardship analysis.[3] On remand, the bankruptcy court concluded that the Debtor's failure to participate in the Ford Program was insufficient to overcome a finding of undue hardship under § 523(a)(8), and again discharged the loans.[4] ECMC appealed.

For the reasons set forth below, we AFFIRM.

BACKGROUND

A. The Debtor's Personal Background

At the time of trial in January 2009, the Debtor was 64 years old and single. She did not have any dependents nor did she suffer from any disability or debilitating medical condition. In 1994, the Debtor, at the age of 50, received a bachelor's degree in English from Wellesley College. Thereafter, from 1996 until 2002, she worked at various jobs as a legal secretary until she decided to go to law school. She enrolled in Southern New England School of Law, and graduated in the top half of her class in December 2005. To finance her law school education, the Debtor took out the student loans now at issue, which at some point were assigned to ECMC. As of September 8, 2008, the loans totaled $82,049.45.

After law school, the Debtor failed the bar exam three times, each time by a significant margin. She does not plan to take the bar exam again because she has no money to pay for the exam fee or preparation materials, and because she has not come close to passing.

After graduating from law school, the Debtor worked briefly as a receptionist and as a temporary patent prosecution secretary at two different law firms. Although she continually went on interviews, made telephone calls, and spoke with employment agencies in an effort to find any kind of secretarial, receptionist, or contract manager work, she was unable to find employment. The Debtor pursued alternate means of earning income, but her attempts were unsuccessful.[5] At the time of trial, the Debtor's only income was a monthly Social Security payment of $946.00. She owned no real property and lived temporarily in her father's house.

B. Procedural History

The Debtor filed a chapter 7 petition in July 2007, and received a discharge in December 2007. Thereafter, the Debtor filed an adversary complaint seeking to discharge her student loan obligations to ECMC.[6] At ECMC's request, the bankruptcy court took judicial notice of the Ford Program, 34 C.F.R. §§ 685.100, *et seq.* The Ford Program offers, among other things, a student loan consolidation repayment option known as the income contingent repayment plan (the "ICRP").

795*795 After a trial, the bankruptcy court issued an order and decision (the "First Decision") discharging the debts owed to ECMC. In the First Decision, the bankruptcy court applied a totality of the circumstances test to determine whether the Debtor would suffer an undue hardship. 2009 WL 95038, at *2-3, 2009 Bankr.LEXIS 69, at *7. In applying this standard, the bankruptcy court found that, given the Debtor's lack of recent work history, narrow work experience, failure to pass the bar exam, age, unsuccessful attempts to find employment in a variety of fields, and unsuccessful attempts to sell a novel and acquire a patent, the Debtor had no reasonably reliable future financial resources other than the Social Security payments. *Id.* at *4-5, 2009 Bankr.LEXIS 69, at *12-14.

The bankruptcy court also recognized that if the Debtor participated in the Ford Program, her current financial status would not require monthly payments. *Id.* at *4, 2009 Bankr.LEXIS 69, at *11. It rejected ECMC's argument that repayment would not cause the Debtor an undue hardship because the Debtor would not be required to make monthly payments under the program. The bankruptcy court stated that if the Debtor were to participate in the Ford Program, "the student loan forgiveness at the conclusion of her participation in the program would result in a tax liability that would subject the Debtor's Social Security benefits to garnishment," which would "promote a vicious cycle that could leave the Debtor in a financial state much more desperate than the one she is currently enduring." *Id.* Additionally, the bankruptcy court referred to its reasoning in *In re Denittis,* 362 B.R. 57, 64-65 (Bankr.D.Mass.2007), in which it concluded that consideration of the Ford Program in the undue hardship analysis would, in effect, foreclose a conclusion of undue hardship whenever a debtor is eligible to participate. *Bronsdon,* 2009 WL 95038, at *4, 2009 Bankr.LEXIS 69, at *11.

On appeal to the district court, ECMC contested the bankruptcy court's factual findings regarding the Debtor's good faith efforts to find work and that she was not likely to earn income in the future. ECMC also argued that the bankruptcy court made errors of law concerning the ICRP. At the outset, the district court noted the two tests for determining undue hardship, but stated that the test to be applied was not a material issue in this case as the result was the same under both tests. The district court then determined that there was ample evidence supporting the bankruptcy court's factual findings and, therefore, that the findings were not clearly erroneous. It also concluded that the bankruptcy court had made a legal error by "giving no weight to the ICRP in the undue hardship analysis." As a result, the district court vacated the First Decision and remanded the matter to the bankruptcy court to consider the impact that participating in the ICRP would have on the undue hardship analysis.

On remand, the bankruptcy court concluded that "the Debtor's failure to participate in the ICRP [wa]s insufficient to demonstrate a lack of good faith (again assuming such finding is integral to the test under § 523(a)(8)) when weighed against this Debtor's efforts to try to improve her financial circumstance," and ordered that the student loans owed to ECMC were discharged. This appeal ensued.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. *See* *Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E.* 796*796 *Bumpus, Jr. Constr. Co.),* 226 B.R. 724 (1st Cir. BAP 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); *Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.),* 218 B.R. 643, 645 (1st Cir. BAP 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *id.* at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." *Id.* (quoting *In re Am. Colonial Broad. Corp.,* 758 F.2d 794, 801 (1st Cir.1985)). Generally, a bankruptcy court's order regarding the dischargeability of a debtor's student loans is a final order. *See* *Educ. Credit Mgmt. Corp. v. Kelly (In re Kelly),* 312 B.R. 200, 204 (1st Cir. BAP 2004).

STANDARD OF REVIEW

The Panel reviews the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo. See* *TI Fed. Credit Union v. DelBonis,* 72 F.3d 921, 928 (1st Cir.1995); *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.),* 43 F.3d 714, 719 n. 8 (1st Cir.1994). Generally, a bankruptcy court's undue hardship determination involves the application of a legal standard to the facts of a particular case and therefore poses a mixed question of law and fact. *See* *TI Fed. Credit Union,* 72 F.3d at 928; *see also* *Nash v. Conn. Student Loan Found. (In re Nash),* 446 F.3d 188, 191 (1st Cir. 2006); *Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (In re Lorenz),* 337 B.R. 423, 429 (1st Cir. BAP 2006). "Appellate courts review bankruptcy court findings of fact under the clearly erroneous standard, but subject legal conclusion[s] drawn by such courts to *de novo* review." *TI Fed. Credit Union,* 72 F.3d at 928.

The district court determined that the bankruptcy court's factual findings were not clearly erroneous, and, therefore, no factual issues were determined by the bankruptcy court on remand. Thus, the bankruptcy court's findings may not be challenged in this appeal. *See* *Ellis v. U.S.,* 313 F.3d 636, 646 (1st Cir.2002) (quoting *Flibotte v. Pa. Truck Lines, Inc.,* 131 F.3d 21, 25 (1st Cir.1997)) (holding that under the law of the case doctrine, a lower court may not relitigate issues that a higher court decided "whether explicitly or by reasonable implication, at an earlier stage of the same case."). Therefore, the standard of appellate review is *de novo* because the issues presented concern matters of law, not of fact. *See* *Braunstein v. McCabe,*571 F.3d 108, 124 (1st Cir.2009).

DISCUSSION

I. The Appropriate Legal Standard

A. The Burden of Proof

Under § 523(a)(8), debtors are not permitted to discharge educational loans "unless excepting such debt from discharge ... would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8). Once the showing is made, the burden shifts to the debtor to prove that excepting the student loan debt from discharge will cause the debtor and her dependents "undue hardship." *Educ. Credit Mgmt. Corp. v. Savage (In re Savage),* 311 B.R. 835 (1st Cir. BAP 2004); *see also* *Smith v. Educ. Credit Mgmt. Corp. (In re Smith),* 328 797*797 B.R. 605 (1st Cir. BAP 2005). The debtor bears the ultimate burden of proving undue hardship by a preponderance of the evidence. *See* *Grogan v. Garner,* 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991);*Burkhead v. U.S. (In re Burkhead),* 304 B.R. 560, 564 (Bankr.D.Mass. 2004).[7]

B. The Tests for Determining Undue Hardship

The Bankruptcy Code does not define "undue hardship" and courts have struggled with its meaning. After several decades of case law interpreting this term, essentially two tests have emerged—the so-called *Brunner* test and the "totality of the circumstances" test. As the First Circuit has noted:

... [N]ine circuit courts of appeal [ ] have followed the Second Circuit's test set forth in *Brunner v. New York State Higher Educ. Servs. Corp.,*831 F.2d 395 (2d Cir.1987) (per curiam). This is a tripartite test, requiring that the debtor show inability, at her current level of income and expenses, to maintain a "minimal" standard of living; the likelihood that this inability will persist for a significant portion of the repayment period; and the existence of good faith efforts to repay the loans. *Id.* at 396. A facially different test is the Eighth Circuit's totality-of-circumstances test, which would have courts consider the debtor's reasonably reliable future financial resources, his reasonably necessary living expenses, and "any other relevant facts." *See* *Long v. Educ. Credit Mgmt. Corp. (In re Long),*322 F.3d 549, 554 (8th Cir.2003).

Nash, 446 F.3d at 190. Although the First Circuit acknowledged the two approaches in *Nash,* it declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in this circuit. *See* *Nash,* 446 F.3d at 190.

In the First Decision, the bankruptcy court applied the totality of the circumstances test to determine whether excepting the Debtor's student loan obligations from discharge would cause her undue hardship. The district court determined that the issue of the appropriate test was immaterial as the result would be the same under either test. On remand, the bankruptcy court again declined to endorse the *Brunner* test. On appeal, ECMC urges the Panel to formally adopt the so-called *Brunner* test.[8]

C. Adopting a Test

As noted above, neither the plain language of § 523(a)(8) nor the First Circuit mandate a particular test for evaluating the dischargeability of student loans. The Panel has also declined to endorse a particular test.[9] Most of the bankruptcy 798*798courts within the First Circuit have adopted the totality of the circumstances test over the *Brunner* test,[10] although a few courts within this circuit have applied *Brunner* instead.[11]

To determine the appropriate test, we first examine the differences between the *Brunner* and the totality of circumstances approaches. As the Panel noted in *In re Lorenz,* the distinctions between the two tests are modest, with many overlapping considerations:[12]

The "totality of the circumstances" analysis requires a debtor to prove by a preponderance of evidence that (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. *Kopf,* 245 B.R. at 739; *see also* *Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks),* 331 B.R. 18, 31 (Bankr.D.Mass.2005) (distilling so-called totality of the circumstances test to "one simple question: *Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?*"). Courts "should consider all relevant evidence—the debtor's income and expenses, the debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under chapter 7 and the debtor's ability to find a higher-paying job, move or cut living expenses." *Hicks,* 331 B.R. at 31; *see also* *Kelly,* 312 B.R. at 206; *Savage,* 311 B.R. at 840;*Bloch v. Windham Prof'ls (In re Bloch),* 257 B.R. 374, 378 (Bankr.D.Mass.2001); *Kopf,* 245 B.R. at 744.

The *Brunner* test differs, albeit modestly. *See* *Kopf,* 245 B.R. at 31 (comparing 799*799 tests). Brunner requires a "three-part showing (1) that the debtor cannot, based on current income and expenses, maintain a `minimal' standard of living for herself or her dependants if forced to repay the loans; (2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." *Brunner,* 831 F.2d at 396....

One can see readily that insofar as income and expenses are concerned, the tests take converging tacks. The "totality test" looks to past, present, and future "financial resources" and "necessary living expenses" and whether, taken together with other factors, the debtor has the ability to repay while maintaining a minimal standard of living. *Brunner* asks the same question looking to "current" income and expenses, then considers whether circumstances inhibiting repayment will endure.

In re Lorenz, 337 B.R. at 430-31.

Although the two tests do not always diverge in function, they do in form. *In re Hicks,*331 B.R. at 26. As the *In re Hicks* court noted: "While under the totality of the circumstances approach, the court may also consider `any additional facts and circumstances unique to the case' that are relevant to the central inquiry (i.e., the debtor's ability to maintain a minimum standard of living while repaying the loans), the *Brunner* test imposes two additional requirements on the debtor that *must* be met if the student loans are to be discharged." *Id.* (emphasis in original). Looking to the bankruptcy court's extensive analysis of the predominant tests in *In re Kopf,* the *In re Hicks* court agreed with *In re Kopf* that the *Brunner* test "test[s] too much." *Id.* at 27.

At first blush, the second *Brunner* requirement—a showing that the debtor's "state of affairs is likely to persist for a significant portion of the repayment period of the student loan"—seems merely to resonate with the forward-looking nature of the undue hardship analysis. That is, under *any* undue hardship standard the debtor must show that the inability to maintain a minimum standard of living while repaying the student loans is not a temporary reality, but will continue into the foreseeable future.

Many courts interpreting and applying the second *Brunner* prong, however, place dispositive weight on the debtor's ability to demonstrate "additional extraordinary circumstances" that establish a "certainty of hopelessness." This has led some courts to require that the debtor show the existence of "unique" or "extraordinary" circumstances, such as the debtor's advanced age, illness or disability, psychiatric problems, lack of usable job skills, large number of dependents or severely limited education.... And, in the absence of such a showing, the court may conclude that the debtor has failed the second *Brunner* prong and the student loans will not be discharged....

Requiring the debtor to present additional evidence of "unique" or "extraordinary" circumstances amounting to a "certainty of hopelessness" is not supported by the text of § 523(a)(8). The debtor need only demonstrate "undue hardship." True, the debtor must be able to prove that the claimed hardship is more than present financial difficulty. *See Kopf,* 245 B.R. at 742, 745. And the existence of any of the factors mentioned above may be highly relevant to a finding that the hardship will persist into the foreseeable future. But whether or not this Court subjectively views 800*800 the debtor's circumstances as "unique" or "extraordinary" is, in a word, overkill.

In re Hicks, 331 B.R. at 27-28. We agree with this rationale and conclude that *Brunner* takes the test too far.

Furthermore, we agree that the "good faith" requirement of *Brunner* is "without textual foundation." *Id.* at 28 (citing *In re Kopf,* 245 B.R. at 741). Ultimately, the debtor must establish by a preponderance of the evidence that her present and future actual circumstances would impose an undue hardship if her debts are excepted from discharge. Irrespective of the test, the decision of a bankruptcy court, whether the failure to discharge a student loan will cause undue hardship to the debtor and the dependents of the debtor under § 523(a)(8), rests on both the economic ability to repay and the existence of any disqualifying action(s). The party opposing the discharge of a student loan has the burden of presenting evidence of any disqualifying factor, such as bad faith. The debtor is not required under the statute to establish prepetition good faith in absence of a challenge. The debtor should not be obligated to prove a negative, that is, that he did not act in bad faith, and, consequently, acted in good faith.

Undue hardship is measured as of trial date, *In re Kelly,* 312 B.R. at 204, and is a forward-looking concept. *In re Kopf,* 245 B.R. at 744.[13] Placing emphasis on prepetition failure to pay misconstrues the wording of the undue hardship requirement in the statute. As stated before, distilled to its essence, the finding of undue hardship under § 523(a)(8) following the totality of the circumstances test rests on one basic question: "Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" *In re Hicks,* 331 B.R. at 31.[14] Answering said question leads the bankruptcy court to discharge its task of making "a principled determination of the requirement's meaning and a careful review of the debtor's circumstances." *In re Kopf,* 245 B.R. at 741.

Having considered the various tests used to determine undue hardship, the plain text of § 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declines to adopt the *Brunner* test as requested by ECMC. The Panel is persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8).[15] *See* *In re Hicks,* 331 B.R. at 32.

801*801 **II. Consideration of the ICRP Under the Totality of the Circumstances Test**

ECMC's primary argument on appeal is that the bankruptcy court failed to adequately consider the availability of the ICRP in its determination of undue hardship under the totality of the circumstances. As noted above, the totality of the circumstances test requires the bankruptcy court to consider "any other relevant facts and circumstances" unique to the particular case, such as the debtor's ability to repay her loans. Although courts applying the totality of the circumstances test have treated the ICRP differently, the weight of authority is to treat the ICRP as one of many factors to consider in evaluating the totality of the debtor's circumstances.[16]Thus, a debtor's eligibility to participate in the ICRP may be considered by the court when applying the totality of the circumstances test, but it is not determinative. *See* *In re Kelly,* 312 B.R. at 206. As set forth below, we conclude that the bankruptcy court properly considered the Debtor's eligibility for the ICRP as part of its examination of the totality of the circumstances.

The Ford Program allows student loans to be consolidated and payments on the consolidated loan to be adjusted based on a formula that takes into account poverty guidelines and a debtor's adjusted gross income. *See* 34 C.F.R. § 685.100, *et seq.* One of the consolidation options under the Ford Program is the ICRP. *See* 34 C.F.R. §§ 685.208-685.209. Under the ICRP, an eligible debtor's annual loan payment is generally equal to 20 percent of the difference between his or her adjusted gross income and the federal poverty guidelines for the debtor's family size, regardless of the amount of unpaid student loan debt. 34 C.F.R. § 685.209. Repayments are made monthly. 34 C.F.R. § 685.208(k). ICRP payments are recalculated annually based on changes to the debtor's reported household adjusted gross income. 34 C.F.R. § 685.209. Unpaid interest is capitalized until the outstanding principal is ten percent greater than the original principal amount. 34 C.F.R. § 685.209(c)(5). If the borrower has not repaid the loan at the end of 25 802*802 years, the unpaid portion of the loan is cancelled. 34 C.F.R. § 685.209(c)(4)(i).

Courts considering the ICRP as a factor under the totality of the circumstances test evaluate both the benefits and drawbacks of the program for the individual debtor within his or her unique circumstances. *Brooks v. Educ. Credit Mgmt. Corp. (In re Brooks),* 406 B.R. 382, 393 (Bankr.D.Minn.2009). Although these courts acknowledge that the ICRP reduces the immediate debt burden of the student loan debtor, they are often concerned about the longer term debt and tax consequences of the program. They recognize that, although it may be appropriate to consider whether a debtor has pursued her options under the ICRP, participation in that program may not be appropriate for some debtors because of the impact of the negative amortization of the debt over time when payments are not made and the tax implications arising after the debt is cancelled. Because of these considerations, the ICRP may be beneficial for a borrower whose inability to pay is temporary and whose financial situation is expected to improve significantly in the future. *See* *In re Vargas,* 2010 WL 148632, at *4-5, 2010 Bankr.LEXIS 63, at *12-13. Where no significant improvement is anticipated, however, such programs may be detrimental to the borrower's long-term financial health. *See id.; see also In re Wilkinson-Bell,*2007 Bankr.LEXIS 1052, at *16.

Central to this analysis is the idea that because forgiveness of any unpaid debt under the ICRP may result in a taxable event, the debtor who participates in the ICRP simply exchanges a nondischargeable student loan debt for a nondischargeable tax debt. Such an exchange of debt provides little or no relief to debtors. *See Thomsen v. Dep't of Educ. (In re Thomsen),* 234 B.R. 506, 514 (Bankr. D.Mont.1999); *see also In re Booth,* 410 B.R. at 675-76; *Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani),*311 B.R. 496, 509 (Bankr.N.D.Il.2004), *aff'd,* 320 B.R. 357 (N.D.Ill.2005); *but see In re Brunell,* 356 B.R. at 580-81 (holding that "[t]o the extent that the Debtor satisfies the requirements for participation in the Ford program, any tax liability based on the forgiven balance at that time is discharged."). For example, in *In re Booth,* the bankruptcy court stated:

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

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

410 B.R. at 675-76. In addition, many of these courts are concerned that the ICRP allows the Department of Education to substitute its administrative determination 803*803regarding undue hardship for the bankruptcy judge's statutorily mandated discretion under § 523(a)(8). *See id.; see also In re Durrani,* 311 B.R. at 509.

ECMC presented undisputed evidence that its loans to the Debtor were eligible for the ICRP. Based on the Debtor's adjusted gross income at the time of trial, the bankruptcy court found that her monthly ICRP payments would be $0.00. In its decision after remand, the bankruptcy court acknowledged that the Debtor was aware of the ICRP and her eligibility to participate, but stated that the fact that the Debtor would not be required to repay her student loan under the ICRP did not mandate a finding that her failure to participate in the program prevented a discharge of the debt.[17] Acknowledging both the potential for significant tax liabilities under the ICRP and its concern that finding failure to participate in a zero payment ICRP is per se lack of good faith would be an abdication of the bankruptcy court's responsibility to determine dischargeability of student loans, it ultimately concluded that:

> ... shackling the Debtor to the ICRP would be ... a pointless exercise. Although her current payments under the ICRP would be zero, interest would continue to accrue despite the fact that the Debtor's chances of ever repaying any portion of the loan are virtually non-existent. The Debtor is now 65 years old, has failed to pass the Massachusetts bar examination three times. She testified she has no plans to retake the exam, which is reasonable in light of her testimony

> that she lacks the funds to do so, has not come within "striking distance" of passing, and importantly had an adverse physical reaction during the third examination whereby she almost fainted. Moreover, as set forth in this Court's Memorandum of Decision, the Debtor has attempted unsuccessfully to find employment as a secretary and has sought to publish a novel. These efforts demonstrate her good faith despite her reluctance to be forced into the Ford Program. Nor are circumstances likely to improve for the Debtor. But for the ability to live in the den of her father's home, the Debtor, without some sort of financial aid, could easily become homeless. In view of her age and work history, her prospects for a better financial future are dim. To subject her to a meaningless repayment plan when she clearly does not have the ability to repay these student loans now or in the foreseeable future is not required by 11 U.S.C. § 523(a)(8) and is inconsistent with this Court's role as the adjudicator of undue hardship.
>
> 2010 WL 147798, at *1-2, 2010 Bankr.LEXIS 71, at *5-6.

ECMC argues that the bankruptcy court failed to comply with the district court's directives for remand. We disagree. Significantly, the district court did not adopt a per se rule that the availability of a zero payment ICRP should automatically result in a finding of nondischargeability. In its decision, the district court held that "[t]he decision whether to discharge [a student loan] in a case where the debtor is eligible but declines to participate in the ICRP must be the result of an individualized analysis in which the ICRP 804*804 is given weight but for which no particular outcome is prescribed." 421 B.R. at 37. Thus, although the district court held that the bankruptcy court is obligated to consider the Debtor's eligibility for participation in the ICRP, it also acknowledged that eligibility alone did not mandate a particular outcome in the undue hardship analysis. *Id.* The district court concluded, therefore, that the ICRP must be considered as a factor in the undue hardship analysis and remanded the case to the bankruptcy court for proceedings to do so. *Id.*

On remand, the bankruptcy court clearly stated that, despite the Debtor's eligibility for the Ford Program, her ability to repay the debt was unrealistic in light of her age, inability to pass the Massachusetts bar examination, difficulty finding employment, and other burdens. These circumstances are amply supported by the record and are appropriate factors to be considered under the totality of the circumstances test. Thus, we conclude that the bankruptcy court adequately considered the Debtor's decision to forego enrollment in the ICRP as a factor within the totality of the circumstances.

III. The Debtor's Work Experience and Age

ECMC argues that the bankruptcy court erred in its legal conclusions regarding the Debtor's work experience and her age. Although ECMC purports to challenge the bankruptcy court's legal conclusions regarding these issues, it essentially restates the arguments it made in the district court regarding the bankruptcy court's factual findings. The district court concluded that the bankruptcy court's factual findings were not clearly erroneous and, therefore, there were no factual issues before the bankruptcy court on remand nor before the Panel in this appeal. *See* *Ellis v. U.S.,*313 F.3d at 646.[18]

CONCLUSION

As set forth above, the Panel concludes that the bankruptcy court did not err in its legal conclusions after remand regarding the weight that the Debtor's eligibility to participate in the ICRP should have in the undue hardship analysis, as well as its conclusion that the totality of the circumstances warranted a finding of undue hardship. Therefore, we AFFIRM.

HAINES, Chief Judge, concurring.

I agree with the majority's conclusion that the judgment of the bankruptcy court should be affirmed; I write separately for several reasons.

The majority concludes that the "totality of the circumstances" test is the proper measure of "undue hardship" for determining the dischargeability of student loan obligations under § 523(a)(8). It goes on to assay the correctness of the bankruptcy court's determination exclusively under the totality of the circumstances model. The determination of the test to be applied to determine dischargeability is, pure and simple, a question of law, reviewed *de novo.* *Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.),* 482 F.3d 15, 17 (1st Cir.2007). We review the bankruptcy court's conclusion of undue hardship as the determination of a mixed question of law and fact. *Lorenz v. Am. Educ. Services/Pa. Higher Educ. Assistance Agency (In re Lorenz),* 337 B.R. 423, 429 (1st Cir. BAP 2006) On the "sliding scale" that applies to review of such questions, a 805*805 determination of undue hardship falls toward the legal/policy end of the spectrum, calling for *de novo* review, as well. *Id.*

I have no quarrel with the majority's conclusion that the debtor demonstrated undue hardship and, therefore, that her student loans should be discharged. This case, however, does not call for choosing between the totality of the circumstances test and the "*Brunner*" test,[19] as employing either test would result in affirmance. The majority's rejection of the *Brunner* test is unnecessary to resolution of this appeal and, therefore, unwarranted. I am no fan of *Brunner.*[20] The majority's criticisms of it are well-taken. I am disinclined to enshrine the majority's legal determination as a holding when it is of no consequence to this case.

Having lost below under the trial court's careful consideration of the totality of the circumstances touching on the debtor's case, the appellant begs us to "adopt" *Brunner.* But we need not respond (either "yes" or, as here, "no") when the answer is of no moment.

Having withstood one appellate assault, the bankruptcy court's factual findings are fixed. They include:

• "[G]iven the Debtor's lack of recent work history, narrow work experience, failure to pass the bar exam, age, unsuccessful attempts to find employment in a variety of fields, and unsuccessful attempts to sell a novel and acquire a patent, the Debtor had no reasonably reliable financial resources other than [...] Social Security payments."[21]

• "[I]f the Debtor participated in the Ford Program, her current financial status would result in her owing no monthly payments for her student loans."[22]

• "But for the ability to live in the den of her father's home, the Debtor, without some sort of financial aid, could easily become homeless. In view of her age and work history, her prospects for a better financial future are dim."[23]

Taken together, these findings provide no basis to conclude that this debtor will *ever* have the financial resources to payoff (or even pay down) her student loan, on *any* terms.

One must ask, then, how could the failure to enroll in a program that would—as far as the judicial eye can see—require the debtor to pay *nothing,* be either a circumstance cutting against discharging the loan under the "totality" test or a lack of "good faith efforts" to pay under *Brunner?* Under either test, the court below was being asked to deny discharge of the loans on what basis? It could only be on the possibility that the debtor might win the lottery or that some equally improbable instance of financial good fortune could strike. Need it be said that, if such were a sufficient basis to deny discharge of a student loan, the prospect of ever discharging a student loan pursuant to § 523(a)(8) would become fantasy?

806*806 Furthermore, taking this case as the one that requires a choice between the totality of the circumstances test and *Brunner* credits a perverse application of the *Brunner* model. The *Brunner* court was concerned about debtors who resorted to bankruptcy and sought to discharge student loans without first making a good faith attempt at repayment.[24] Flipping the test's historical "good faith effort to repay" prong into the future is a misapplication.[25] And in cases like this one, courts would no longer inquire whether a debtor could repay a student loan without undue hardship (as the statute asks). Instead, they would be required to consider whether: (1) when there exists no reasonable possibility of payment; and (2) there exists a program that would require no payment, discharge of student loans must be denied because the debtor cannot satisfy *Brunner's* "good faith" prong ... because the debtor has not enrolled in the program?

Given that the choice of test makes no difference in this case, and that to make the unnecessary choice here can only contribute to the confusion surrounding undue hardship analysis, I am left to concur in the majority's conclusion without joining it on the path it has taken to reach it.

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, *et seq.*

[2] *See Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon),* Adv. Pro. No. 08-1062, 2009 WL 95038, 2009 Bankr.LEXIS 69 (Bankr. D.Mass. Jan. 13, 2009).

[3] *See Educ. Credit Mgmt. Corp. v. Bronsdon,* 421 B.R. 27 (D.Mass.2009).

[4] *See Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon),* Adv. Pro. No. 08-1062, 2010 WL 147798, 2010 Bankr.LEXIS 71 (Bankr. D.Mass. Jan. 8, 2010).

[5] For example, the Debtor wrote a novel but was unable to find a publisher. She also applied for a patent on an invention to protect the privacy of hospital patients. At the time of trial, the Debtor had not received a response regarding the patent, and was considering writing another novel or starting a website that would feature commentary on current events.

[6] The original complaint was filed against "Sallie Mae, Inc." However, the bankruptcy court subsequently granted ECMC's motion to intervene and be substituted as the defendant in the proceeding.

[7] In attempting to prove undue hardship under § 523(a)(8), a debtor:

... has a formidable task, for Congress has made the judgment that the general purpose of the Bankruptcy Code to give honest debtors a fresh start does not automatically apply to student loan debtors. Rather, the interest in ensuring the continued viability of the student loan program takes precedence.

Nash, 446 F.3d at 191 (citation omitted). Proof of undue hardship is generally found only in "truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents." *T.I. Fed. Credit Union v. DelBonis,* 72 F.3d 921, 927 (1st Cir. 1995).

[8] ECMC, acknowledging that the First Circuit has not adopted either test for determining undue hardship, stated in its brief: "ECMC respectfully requests that this Court join the Nine Circuits that have formally adopted the *Brunner* test." Appellant's Brief at 5.

[9] In several prior cases involving the dischargeability of student loans under § 523(a)(8), the Panel has declined to adopt either the *Brunner* or the totality of the circumstances test, finding either that the result would be the same under either test, or that the appealing party had waived the issue of the applicable test. *See, e.g., In re Lorenz,* 337 B.R. at 430; *Joyce v. Mt. Peaks Fin. Servs., Inc. (In re Joyce),* 342 B.R. 385 (1st Cir.2005); *In re Kelly,* 312 B.R. at 206; *In re Savage,* 311 B.R. at 839.

[10] *See, e.g., Sanborn v. Educ. Credit Mgmt. Corp. (In re Sanborn),* 431 B.R. 5, 2010 WL 2572717 (Bankr.D.Mass. Jun.23, 2010); *Taratuska v. The Educ. Res. Inst., Inc. (In re Taratuska),* 2010 WL 583952 (Bankr.D.Mass. Feb. 12, 2010); *Fahrenz v. Educ. Credit Mgmt. Corp. (In re Fahrenz),* 2008 WL 4330312 (Bankr.D.Mass. Sept. 17, 2008); *Brunell v. Citibank (S.D.) N.A. (In re Brunell),* 356 B.R. 567 (Bankr.D.Mass.2006); *Paul v. Suffolk Univ. (In re Paul),* 337 B.R. 730 (Bankr.D.Mass. 2006); *Gharavi v. U.S. Dep't of Educ. (In re Gharavi),* 335 B.R. 492, 497 (Bankr.D.Mass. 2006); *Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks),* 331 B.R. 18, 31-32 (Bankr.D.Mass. 2005); *Bourque v. Educ. Credit Mgmt. Corp. (In re Bourque),* 303 B.R. 548, 550 (Bankr. D.Mass.2003); *Lamanna v. EFS Servs., Inc. (In re Lamanna),* 285 B.R. 347 (Bankr.D.R.I. 2002); *Dolan v. Am. Student Assist. (In re Dolan),* 256 B.R. 230, 238 (Bankr.D.Mass. 2000); *Kopf v. Dep't of Educ. (In re Kopf),* 245 B.R. 731, 741 (Bankr.D.Me.2000);*Phelps v. Sallie Mae Loan Serv. Ctr. (In re Phelps),* 237 B.R. 527 (Bankr.D.R.I.1999).

[11] *See Gallagher v. Educ. Credit Mgmt. Corp. (In re Gallagher),* 333 B.R. 169, 173 (Bankr. D.N.H.2005); *Grigas v. Sallie Mae Serv. Corp. (In re Grigas),* 252 B.R. 866 (Bankr.D.N.H. 2000);*Garrett v. N.H. Higher Educ. Assistance Found. (In re Garrett),* 180 B.R. 358 (Bankr.D.N.H. 1995).

[12] Indeed, the Panel has stated that the only practical difference between the two tests is that under *Brunner,* the debtor must establish that she made a good faith effort to repay the loans. *See In re Kelly,* 312 B.R. at 206.

[13] *See* Feather D. Baron, *The Nondischargeability of Student Loans in Bankruptcy: How the Prevailing "Undue Hardship" Test Creates Hardship of Its Own,* 442 U.S.F. L.Rev. 265 (Summer 2007), for timing and ripeness issues in § 523(a)(8) actions.

[14] *See also In re Nash,* 446 F.3d at 192 (stating at the outset that "[u]nder any test assessing eligibility for discharge of student loan debt, appellant must show that her current inability to maintain a minimal standard of living if forced to repay the debt will continue into the future.").

[15] The First Circuit has endorsed the totality of the circumstances approach in related bankruptcy settings. *See Marrama v. Citizens Bank of Mass. (In re Marrama),* 430 F.3d 474, 482 (1st Cir.2005)(good faith is a fact intensive determination to be made on a case-by-case basis assessing the totality of the circumstances), *aff'd,* 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); *Merrimac Paper Co., Inc. v. Harrison (In re Merrimac Paper Co., Inc.),* 420 F.3d 53, 62-63 (1st Cir.2005) (a court sitting in equity must determine the subordination of a claim based on the totality of the circumstances in the particular case); *McMullen v. Sevigny (In re McMullen),* 386 F.3d 320, 328-29 (1st Cir.2004) (whether a party has acted in bad faith is a quintessential issue of fact to be determined following an examination of the totality of the circumstances); *Smith Barney, Inc. v. Strangie (In re Strangie),* 192 F.3d 192, 196-97 n. 9 (1st Cir. 1999) (concluding that in light of the entire record, and endorsing that whether to pierce a corporate veil is a factual issue to be examined under the totality of the circumstances, the bankruptcy court's determination that the corporate form should be respected is not clear error); *First USA v. Lamanna (In re Lamanna),* 153 F.3d 1, 2 (1st Cir.1998) (adopting the totality of the circumstances test as the measure of substantial abuse under § 707(b) of the Bankruptcy Code); *Palmacci v. Umpierrez,* 121 F.3d 781, 793 (1st Cir.1997) (fraudulent intent in a § 523(a)(2)(A) action is normally determined from the totality of the circumstances); *Williamson v. Busconi,* 87 F.3d 602, 603 (1st Cir. 1996).

[16] *See, e.g., In re Denittis,* 362 B.R. at 64; *see also Educ. Credit Mgmt. Corp. v. Jesperson,* 571 F.3d 775, 782 (8th Cir.2009); *Cheney v. Educ. Credit Mgmt. Corp. (In re Cheney),* 280 B.R. 648 (N.D.Iowa 2002); *Walker v. Sallie Mae Serv. Corp. (In re Walker),* 427 B.R. 471, 486-87 (8th Cir. BAP 2010); *Lee v. Regions Bank Student Loans (In re*

Lee), 352 B.R. 91, 95 (8th Cir. BAP 2006); *Vargas v. Educ. Credit Mgmt. Corp. (In re Vargas),* 2010 WL 148632, *4-5, 2010 Bankr.LEXIS 63, *12-13 (Bankr. C.D.Ill. Jan. 12, 2010); *Booth v. U.S. (In re Booth),* 410 B.R. 672, 675-76 (Bankr. E.D.Wash.2009);*Halverson v. U.S. Dep't of Educ. (In re Halverson),* 401 B.R. 378 (Bankr. D.Minn.2009); *Collins v. Educ. Credit Mgmt. Corp. (In re Collins),* 376 B.R. 708, 716 (Bankr.D.Minn.2007); *Wilkinson-Bell v. Educ. Credit Mgmt. Corp. (In re Wilkinson-Bell),* 2007 Bankr.LEXIS 1052, * 16 (Bankr. C.D.Ill. Apr. 7, 2007).

[17] There are courts that, despite following the *Brunner* test, have held that forgoing enrollment in the ICRP is a factor to consider in determining whether a debt is excepted from discharge under § 523(a)(8), but that the failure to participate is not per se indicative of bad faith and is not outcome determinative. *See, e.g., Barrett v. Educ. Credit Mgmt. Corp.,* 487 F.3d 353 (6th Cir.2007); *Educ. Credit Mgmt. Corp. v. Mosley,* 494 F.3d 1320 (11th Cir.2007).

[18] We agree with the district court's conclusion that "[t]he record shows a pattern of gradually decreasing employability followed by prolonged unemployment, despite a broad and vigorous job search and increasing education and work experience." 421 B.R. at 33.

[19] *Brunner v. New York State Higher Educ. Servs. Corp.* 831 F.2d 395 (2d Cir. 1987) (hereafter*"Brunner"*).

[20] *See In re Lorenz,* 337 B.R. at 432; *Kopf v. Dep't of Educ. (In re Kopf),* 245 B.R. 731, 741 (Bankr.D.Me.2000).

[21] Supra at 4.

[22] Supra at 4.

[23] *Bronsdon v. Educ. Credit Mgmt. Corp.(In re Bronsdon),* 2010 WL 147798, at *2, 2010 Bankr.LEXIS 71, at *6 (Bankr.D. Mass. Jan 8, 2010); *Educ. Credit Mgmt. Corp v. Bronsdon (In re Bronsdon),* 421 B.R. 27, 33 (D.Mass. 2009) (affirming the bankruptcy court's finding that Bronsdon would not be able to obtain employment in the future).

[24] *Brunner,* 831 F.2d at 397; *see Cazenovia College v. Renshaw (In re Renshaw),* 222 F.3d 82, 87 (2d Cir.2000) ("Congress enacted § 523(a)(8) because there was evidence of an increasing abuse of the bankruptcy process that threatened the viability of educational loan programs and harm to future students as well as taxpayers"); *United Student Aid Funds v. Pena (In re Pena),* 155 F.3d 1108, 1111 (9th Cir. 1998) ("Section 523(a)(8) was a response to `a rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts'"); *Andrews Univ. v. Merchant (In re Merchant),* 958 F.2d 738, 740 (6th Cir. 1992) ("The legislative history of the 11 U.S.C. § 523(a)(8) teaches us that the exclusion of education loans from the discharge provisions was designed to remedy an abuse by students, who immediately upon graduation, filed petition for bankruptcy and obtained a discharge of their educational loans.").

[25] *See, e.g., In re Kopf,* 245 B.R. 731; *Educ. Credit Mgmt. Corp. v. Polleys,* 356 F.3d 1302, 1310 (10th Cir.2004) ("Courts should base their estimation of a debtor's prospects on specific articulable facts, not unfounded optimism."); *Wilson v. Educ. Credit Mgmt. Corp. (In re Wilson),* 2002 WL 32155401, *4 (Bankr. E.D.Va. Jun.25, 2002) ("Good faith effort also requires `the debtor to have made payments when he or she was in a position to make such payments.'") (quoting *Lohr v. Sallie Mae (In re Lohr),* 252 B.R. 84, 89 (Bankr.E.D.Va. 2000)); *Maulin v. Sallie Mae (In re Maulin),* 190 B.R. 153, 156 (Bankr.W.D.N.Y.1995) ("[T]he demonstration of good faith does not necessarily command a history of payment. It does require a history of effort to achieve repayment ... Relevant proof may ... include a history of some payment, the propitious use of deferments and the energetic exploration of employment options.").

Second Circuit Law

The Second Circuit's decision, below, in Brunner, was itself not an unreasonable decision based upon the facts as it outlined (we don't know anything else about the case), but it has created a tremendous amount of mischief because of its second and third prongs. As the court noted in Brunner itself and in *Bronsdon* (above in First Circuit law), these parts of the test are not required by the bankruptcy statute. And as the court in *Bronsdon* also noted, the courts have often used these parts of the test to deny people in the direst circumstances a right to help. Note the casual morality of the decision and the arrogance of the court.

We suggest that you look at the "How Cited" button in the case on Google Scholar and look for cases applying the law more leniently if you live in the Second Circuit. In other words, *Brunner* still applies and controls the law in the Second Circuit, but some courts have backed off of the harshest results a little bit. Find those cases by clicking on "How Cited" link and reading cases from your jurisdiction that moderate the worst of this formula.

Brunner "Good Faith" Requirement and its Equivalent

As we have said, most of the courts addressing the question of student loan dischargeability have adopted some version of the Brunner case. While we have no issue with the way the *Brunner* court itself applied its reasoning to Brunner under the circumstances of that case, we believe adopting the test on a widespread and required basis has been a mistake.

To recap briefly, the Brunner test requires that a person with a student loan must, in order to obtain discharge, first show a "minimal" lifestyle; second, some sort of "special or exceptional" circumstances that suggest that the person's hardships will continue for a significant part of the repayment period; and third, that the person has made "good-faith" efforts to repay the loan.

Brunner obtained an advanced degree, and within a month of the due date for the first payment she would have had to make, filed for bankruptcy. She may not have been the poster child for students attempting to unload their debt prior to beginning lucrative careers, but she looked like it. The court very reasonably applied the law to find that her attempted exit within thirty days was in bad faith (although even so we would not be surprised to learn the Brunner's distress in the face of large loans and no job was genuine).

We pointed out above that at the time of Brunner, the law provided for the complete discharge of student loan debt after five or seven years as a matter of course. Student loans were smaller and of shorter duration because the schools had only just begun the relentless process of increasing tuitions every year. Taken together, that meant that Brunner herself was to face up to five years of difficulty before she would be allowed to erase her debt. One decent job during that time would have made all her troubles go away for good. It was very reasonable to make her put up with that amount of discomfort as part of the "deal" for her loan.

Brunner has routinely been applied, however, to cases where the loans were already over ten years old at the time of the bankruptcy – where they had long been inflicting tremendous damage on the psyches of the debtors. During all that time, the debtors had had their lives constricted by the debts during all that time far surpassing the time Brunner ever conceivably even could have faced. The amounts of the debts have been so large, and the repayment period so long, that the "good faith" requirement of Brunner has been almost insurmountable. In that situation, the unforgiving Brunner test simply negates the "fresh start" imperative of the bankruptcy law. As a matter of social policy, our nation must at some point say, of student debt, that "enough is enough."

In re Bene, 474 B.R. 56 (2012), although it reaches a compassionate result, is a perfect example of what is wrong with the Brunner analysis. In that case, the court pompously states that, "To some extent, this case is about choices that student loan debtors made long before seeking discharge of student loans in bankruptcy court….Ms. Bene never chose to be poor; never chose to leave a good-paying vocation for higher education that was not sufficiently profitable; never got a degree or diploma, because she chose to care for her parents and sacrificed the education that she borrowed-for; paid on the student loan debt what she could for 25 years" Id. at 57-58.

In short, the judge liked Ms. Bene and disapproved of the life choices that the other people seeking to discharge student loans had made. The bankruptcy provision Brunner analyzed was designed to be ***forward*** looking. What the *Bene* court had done in the previous decisions it reviewed, as so many Brunner courts before it had done, was look at the "undue" part of the Brunner test and use it to justify an essentially moral, rather than legal, analysis of the lives of the people seeking discharge.

As the court in *Brunner* itself noted, there was no textual support for this type of analysis in the bankruptcy provision itself, and we would argue that, where the life decisions of the bankrupt, however unwise or even foolish, do not amount to an attempt to evade payment of the loans, then the hardship is not "due." To allow the courts, under the pretext of analyzing what constitutes an "undue" hardship, to apply their own lifestyle choices in a moralistic sense, is to turn the law into an arbitrary and unjust system. The courts should stop following the test and should, instead, apply a test that forces them to apply the law in a more objective way. **The text of Brunner is below, followed by In re Bene**.

One important analytical addition of Bene is that the court analyzed the "bargain" between student borrowers and the lenders and noted that the government, through its various changes in the law and the addition of programs (such as the ICRP) has radically changed that bargain to the detriment of student borrowers. If your loan dates back into the 1990s, this is an argument you should consider making.

Brunner v. New York State Higher Educ. Services, 831 F. 2d 395 - Court of Appeals, 2nd Circuit 1987

831 F.2d 395 (1987)

Marie BRUNNER, Appellant,
v.
NEW YORK STATE HIGHER EDUCATION SERVICES CORP., Appellee.

No. 41, Docket 87-5013.

United States Court of Appeals, Second Circuit.

Argued September 22, 1987.

Decided October 14, 1987.

396*396 Marie Brunner, pro se.

Frederick J. Schreyer, Albany, N.Y., for appellee.

Before LUMBARD, OAKES and KEARSE, Circuit Judges.

PER CURIAM:

Marie Brunner, pro se, appeals from a decision of the United States District Court for the Southern District of New York, Charles S. Haight, Judge, which held that it was error for the bankruptcy court to discharge her student loans based on "undue hardship," 46 B.R. 752 (Bankr.D.C.N.Y.1985). We affirm.

While this court is obliged to accept the bankruptcy court's undisturbed findings of fact unless they are clearly erroneous, it is not required to accept its conclusions as to the legal effect of those findings. *Montco, Inc. v. Glatzer (In re Emergency Beacon Corp.),* 665 F.2d 36, 40 (2d Cir.1981) (citing *Queens Blvd. Wine & Liquor Corp. v. Blum,* 503 F.2d 202 (2d Cir.1974); R.Bankr.P. 810 (current version, *see* R.Bankr.P. 8013); *Bank of Pa. v. Adlman,* 541 F.2d 999, 1005 (2d Cir.1976)). Whether not discharging Brunner's student loans would impose on her "undue hardship" under 11 U.S.C. § 523(a)(8)(B) requires a conclusion regarding the legal effect of the bankruptcy court's findings as to her circumstances. Therefore, the bankruptcy court's conclusion of "undue hardship" properly was reviewed by the district court.

As noted by the district court, there is very little appellate authority on the definition of "undue hardship" in the context of 11 U.S.C. § 523(a)(8)(B). Based on legislative history and the decisions of other district and bankruptcy courts, the district court adopted a standard for "undue hardship" requiring a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. For the reasons set forth in the district court's order, we adopt this analysis. The first part of this test has been applied frequently as the minimum necessary to establish "undue hardship." *See, e.g., Bryant v. Pennsylvania Higher Educ. Assistance Agency (In re Bryant),* 72 B.R. 913, 915 (Bankr.E.D.Pa.1987); *North Dakota State Bd. of Higher Educ. v. Frech (In re Frech),* 62 B.R. 235 (Bankr.D.Minn.1986); *Marion v. Pennsylvania Higher Educ. Assistance Agency (In re Marion),* 61 B.R. 815 (Bankr.W.D.Pa.1986). Requiring such a showing comports with common sense as well.

The further showing required by part two of the test is also reasonable in light of the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt. Predicting future income is, as the district court noted, problematic. Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is "undue."

Under the test proposed by the district court, Brunner has not established her eligibility for a discharge of her student loans based on "undue hardship." The record demonstrates no "additional circumstances" indicating a likelihood that her current inability to find any work will extend for a significant portion of the loan repayment period. She is not disabled, nor elderly, and she has — so far as the record discloses — no dependents. No evidence 397*397 was presented indicating a total foreclosure of job prospects in her area of training. In fact, at the time of the hearing, only ten months had elapsed since Brunner's graduation from her Master's program. Finally, as noted by the district court, Brunner filed for the discharge within a month of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment, a less drastic remedy available to those unable to pay because of prolonged unemployment. Such conduct does not evidence a good faith attempt to repay her student loans.

It is true, however, that considerable time has elapsed since the original filing of Chapter 7 proceedings, and even since the hearing before the bankruptcy judge. We note that Judge Haight's order was without prejudice to Brunner's seeking relief pursuant to R.Bankr.P. 4007(a), (b).

Judgment affirmed.

474 B.R. 56 (2012)

In re Donna M. BENE, Debtor.
Donna M. Bene, Plaintiff
v.
Educational Credit Management Corporation, Defendant.

Bankruptcy No. 03-14328 K. Adversary No. 08-1167 K.

United States Bankruptcy Court, W.D. New York.

June 26, 2012.

57*57 Brad Davidzik, Esq., Jeffrey Freedman Attorneys at Law, Buffalo, NY, Attorney for Plaintiff.

Stephen M. O'Neill, Esq., PLLC, Buffalo, NY, Attorney for Defendant.

OPINION, DECISION AND ORDER DISCHARGING STUDENT LOAN DEBT

MICHAEL J. KAPLAN, Bankruptcy Judge.

SYNOPSIS

To some extent, this case is about choices that student loan debtors made 58*58 long before seeking discharge of student loans in bankruptcy court.

Three prior rulings by this writer are implicated — *Melton, DeRose* and *Kraft.* In *Melton,* this Court held that a decision to stay poor *after* bankruptcy despite higher-paying options will not satisfy the *Brunner* Test, no matter how noble the reasons for that choice. For example, a skilled physician who chooses to remain a missionary after bankruptcy will not prevail under *Brunner.*

DeRose involved a choice by a well-paid and debt-free Registered Nurse to enter chiropractic school at age 45. She undertook substantial student loan debt and became a chiropractor. She discovered that that profession did not provide the income necessary to repay the debt in the normal way. This Court ruled that she could not complain of that fact, despite her age (54) at the time of trial. She could not be heard to complain of Ford Program options that would *not* be an "undue hardship" for her despite the fact that she could not repay the debt in her lifetime.

Kraft involved a debtor who drove a school bus, hoping to find a job in her chosen field — the travel industry.

Here we have a debtor who, at age 33 back in 1981, had no higher education and then set-out for a college education at one of our fine local institutions — Canisius College. She was never able to complete that education for reasons to be discussed later, and never received a degree or professional diploma or license.

Ms. Bene never chose to be poor; never chose to leave a good-paying vocation for higher education that was not sufficiently profitable; never got a degree or diploma, because she chose to care for her parents and sacrificed the education that she borrowed-for; paid on the student loan debt what she could for 25 years; has worked twelve years on an assembly line (and has now received a layoff notice at age 64); has no other debt; and now as a last resort seeks to discharge $56,000 in student loan debt (the original borrowing totaled $ 16,931.00 back in the '80s), rather than indenturing herself to the William D. Ford Program for the next 25 years.

Consequently the question before the Court is whether the Educational Credit Management Corp. may, by offering better and longer repayment terms for student loans through the William D. Ford Program, "finesse" the words and the intention of 11 U.S.C. § 523(a)(8) as interpreted in 1987 by *In re Brunner,* 831 F.2d 395 (2nd Cir.1987).

This Court finds that such *ex post facto* approach is not supportable as against *this particular* Debtor, under 11 U.S.C. § 523(a)(8), given that her last borrowing was 25 years ago.

Stated in another way, one important cornerstone of the *Brunner* test was the "bargain" between a student loan borrower and the governmentally-insured lender. There can be no doubt that the United

States changed that "bargain" from time to time (see fn. 15 below) in such ways as to make it no "bargain" at all.

Many circumstances have caused student loan debtors to file for bankruptcy relief and to sue for discharge of student loan debt under § 523(a)(8). Maybe they were unable to complete their education. Maybe they completed their education but it was not as lucrative as they supposed. Maybe illness or injury blocked fulfillment of the promise or expectation of their education, even when fully achieved.

It is this Court's finding that ECMC invites the Court to cross the bar suggested by Collier (discussed later) to the effect that the Ford Program might imply a repeal of § 523(a)(8). This Court does not 59*59 accept that invitation. The changes in the ways that a former student may "satisfy" a student loan, without ever "repaying" it, do not supplant 11 U.S.C. § 523(a)(8) and do not supplant the *Brunner* interpretation of the statute.

SUMMARY

In 1987, the *Brunner* Court confronted 11 U.S.C. § 523(a)(8) and the meaning of "undue hardship" in repaying a student loan. It used words and phrases that do not have the same meaning now, just 25 years later. That is because some were sociological terms, not legal terms, though they have become legal terms in the minds of some litigants, especially student loan lenders.

Brunner has achieved "biblical" status among such litigants, and has consequently spawned some myths — myths that some courts have adopted as law. This writer explains below why the *Brunner* decision's words of 1987 must be reconciled with the words of today.

That decision used the words "poverty" and "minimal standard of living." Those words have a different meaning today. It also used the phrase "the repayment period," as if that were a "term of art" meaning 8 to 10 years. Now it can be 25 years. This Court must attempt to extract the substance of *Brunner* from its outdated language.

Were this case about *Brunner* alone, it would be daunting enough. But something else has intervened to throw analysis of, and obedience to, that binding decision into disarray. Specifically, the current version of the William D. Ford Program collides with *Brunner*. The last student loan that this Debtor (Ms. Bene) borrowed was on August 31, 1987. From August 26, 1981 to that date, she borrowed $16,931.00. Six years of borrowing, a long time ago. She never completed her education, for very good reasons.[1] As of the day of trial her obligation was $56,298.70. Because she availed herself of periods of deferral and forbearance (and also the current Chapter 13 case in which she has completed her Plan), she has made only $2400 in payments on this debt in the nearly 25 years since it first became due. That, however, was the best she could do.[2] The latest incarnation of the Ford Program offers her debt-forgiveness if she completes a 25-year program of affordable payments. That was not available when *Brunner* was decided in her last year of borrowing, 1987 (coincidentally). And since the intervention of such options it seems that the Second Circuit has not had occasion to revisit *Brunner* in any way that would guide this Court.[3] The commentators have, however, so revisited.

60*60 For example, Collier states "Courts must ... be careful not to treat the enactment of the statute authorizing the United States Department of Education to accept an income-contingent repayment plan as an implied repeal of § 523(a)(8) of the Bankruptcy Code.... At bottom, the Bankruptcy Code requires Bankruptcy Courts to decide how much personal sacrifice society expects from individuals who accepted the benefits of guaranteed student loans but who have not obtained the financial rewards they had hoped to receive as a result of their educational expenditures." Collier on Bankruptcy, 15th Edition ¶ § 523.14[2].

Refining its earlier attempt in *DeRose,* this Court finds that it must first determine whether the Debtor would pass the *Brunner Test but for* the options currently available to her under the Ford Program. As set forth below, the Court finds that Ms. Bene has passed that test.

Once so ruling, this Court must then attempt to address the intervening current version of the Ford Program in *Brunner* terms. Although it is permissible that this Court *distinguish Brunner* as to issues posed by the Ford Program, the Court seeks to reconcile *Brunner* with the current version of the Ford Program. In doing so, this Court will borrow analyses from other jurisdictions (some of which are not bound by *Brunner)* where it has been concluded that the availability of the Ford Program is just one of a "totality of factors" that the Court must apply in a § 523(a)(8) analysis. (See, e.g. *Long v. Educational Credit Mgmt. Corp. (In re Long),* 322 F.3d 549 (8th cir.2003)).

In sum, the Court will conclude that the *Brunner Test* comes first, and that the Debtor has passed that test. Then comes the effect of changes in the repayment options offered by the current version of the Ford Program. The Debtor here passes a "totality" test as well. The two paths do come together under a *Brunner* analysis.

(The Court is not unmindful of the fact that taxpayers (including this writer) bear the ultimate burden of the debt at issue here. It will address that policy concern below as well.)

I. INTRODUCTION

This matter is governed by the binding decision in In re Brunner, 831 F.2d 395 (2nd Cir.1987). In that case, two great "public `goods'" came into collision: the federally-guaranteed student loan program (which made higher education or specialized training available to persons without wealth or creditworthiness), and the Biblically-inspired notion (Deut. 15) of forgiveness of debt, enabling a "fresh start." Now a third "great good" collides with the *Brunner* court's resolution of the first head-to-head conflict — the current version of the William D. Ford Program[4] which makes it harder for a student loan borrower to meet the "Brunner Test" to obtain a discharge of that debt in bankruptcy. It does so by forgoing "repayment" of the debt, and substituting "satisfaction" of the debt after a long period of "affordable payments."

61*61 (Until fairly recently (perhaps in 2003), the Program could offer greatly reduced repayment terms, but could not offer forgiveness of unpaid balance. Now it can do so after a student loan debtor completes a long-term repayment period, paying what she can afford. (The Debtor here is offered a 25-year term.))

This case permits the Court to expand upon its own interpretation of the commands of the *Brunner* decision, to consider possible misinterpretations of this Court's decision in *Melton,* 187 B.R. 98 (Bankr. W.D.N.Y.1995), and to place this Court's prior ruling in *DeRose* in a broader context.

The Court first lays *Melton* to rest. Apparently, dictum in *Melton* has been held out to some courts as standing for the proposition that if a debtor, *in the past,* made a noble moral choice to remain poor despite the existence of student loan debt, that choice will not relieve the debtor from student loans under the *Brunner* Test. Nothing could have been further from this writer's mind. Even in the face of existing debt, people make bad or immoral choices, use bad judgment, make mistakes. The Bankruptcy Code forgives most of those. What 11 U.S.C. § 523(a)(8) does not forgive is a choice to *become* poor, or to *remain* poor, *after bankruptcy,* while better earning options are available and student loan debt remains unpaid.

In the case at Bar there was no mistake, no bad judgment, and no immoral choice. The Debtor simply chose to care for her infirm parents and sacrifice the completion of her education. This was a choice she made before she made her last student loan borrowing in 1987. Today, Ms. Bene (pronounced "Be'nay") has completed her Chapter 13 Plan, has paid only $2483.81 over the years since 1987, and faces $56,298.70 in remaining student loan debt, having borrowed only $16,931.00 during the years 1981 to 1987. (The difference is accrued interest.)[5]

This Court holds that the *Brunner* test looks to the present and the future, not to the distant past. The test requires that the Court determine whether present circumstances will continue for a time into the future for reasons outside a debtor's control. A moral choice that some debtor made 24 or more years ago to forego opportunities she then had to improve herself, and thus to optimize her potential to earn enough money to repay her student loan debt, is not relevant to a *Brunner* analysis.

This Court also holds that the same is true as to a moral decision to devote a lump sum of money to the care of a debtor's parents two decades ago, when that money would have paid-off the pre-existing loan debt, as discussed below.

This case is an ideal case because she has no other debt, has not had a credit card in over 20 years, has no previous bankruptcies, is 64, single, no dependents, apparently never married, no disabilities, has been an assembly-line worker for 12 years, lives so modestly that her only phone is a pre-paid cellular phone (no "land-line"), and has no television at all (let alone *cable* T.V.), no entertainment expenses (she testified that she is active in her church and "reads a lot"), no retirement funds, no savings, no health care plan, lives alone in an apartment that costs $515/mo., and has received a notice from work that she will be laid-off62*62 in 6 to 12 months. Her monthly expenses average $1526. Her monthly wages are $1591, net of taxes. And this is a Chapter 13 case, not a Chapter 7 case: she completed a 5% Plan solely for the student loan debt.

The Debtor is before this Court *only* because of very old student loan debt, and only as a "last resort."

There can be no more important case in which to consider *Brunner* and *DeRose* again.

II. THE ISSUES

(1) What is a "minimal standard of living" under the first prong of *Brunner?* (2) Assuming that the Debtor might appear to satisfy the first prong, may the lender avail itself of a *long-past* moral *choice* by the Debtor that left her among the "working poor?" (3) What role does the availability of the current version of the William D. Ford Program play within the *Brunner* analysis? (4) The Debtor faces imminent job loss, and at 64 years of age, what does that mean under *Brunner?* (5) In 1986, her parents transferred $25,000 of their money to her as part of Medicaid or Medicare planning. It was not a gift, but constituted money already earned by her for her care of them. She chose to devote that money to her parents' care, rather than to paying-off her student loan debts or completing her higher education. How does that figure into a *Brunner* analysis?

Defendant ECMC has skillfully sought to spread all of the above questions across all three prongs of the *Brunner* test, as it did in *DeRose.* The Court finds that a useful analysis and understanding of the present case is not advanced by using the three-prong *Brunner* test at the outset, though the Court must obey *Brunner* in the end.

III. BRUNNER (NOT THIS DEBTOR, MS. BENE)

The facts of *Brunner* were these (as found by the district court (46 B.R. 752)).

Ms. Brunner received her B.A. Degree in 1979 and a Masters Degree in Social Work in May of 1982. About seven months later she filed her Chapter 7 petition. Her student loans, $9,000, were 80% of her total debts. Two months after that, the nine-month grace period (after receiving the Masters Degree) expired, and she commenced her Adversary Proceeding against the Higher Education Services Corp. ("HESC") under 11 U.S.C. § 523(a)(8) seeking discharge of the student loans. After a bench trial, the bankruptcy court discharged the loans. HESC appealed. (HESC was "Higher Educational Services Corp."). Her attorney apparently then withdrew. She was *pro se* on the appeal before the district court, and no brief was filed by her or for her. Rather than treating this as a default under the briefing schedule, the district court assumed that she opposed (apparently she did not appear on the appeal) and proceeded to the merits.

The district court cogently examined the legislative history of § 523(a)(8), finding very little guidance there regarding what might be "*undue* hardship" as opposed to mere "hardship." That court then found some guidance from courts in other jurisdictions. It adopted the "minimal standard of living" standard from the 8th Circuit Court of Appeals. Then it said this: "After all, it is not unreasonable to hold that committing the debtor to a life of *poverty* for the term of the loan — generally *ten years* — imposes \`undue' hardship."[6] [Emphasis added.]

63*63 (For purposes of the case at Bar, the first lesson to be learned from that decision is that the district court in *Brunner* was not equating "minimal standard of living" with "poverty." It was simply setting an extreme beyond which further inquiry is not required — committing a debtor to payment of the student loans in a way that left a life of *poverty* for an extended period of time clearly *would be* "undue hardship." But requiring the debtor to *maintain a "minimal standard of living"* for an extended period of time *while paying* the student loans might not be a hardship that is "undue.")

The district court then looked to the question of what the future might hold for Ms. Brunner. It said, of course, "Predicting the future ... is never ... easy." Regrettably (from this writer's point of view), the district court in *Brunner* looked to the bankruptcy court decision in the case of *In re Briscoe,* 16 B.R. 128 (Bkrtcy. S.D.N.Y.1981). That bankruptcy court said "Dischargeability of student loans should be based upon the certainty of hopelessness, not simply present inability to fulfill financial commitment."[7] Although the district court in *Brunner* stated that that sad statement is "perhaps the best articulation" of the forward-looking aspect of its inquiry, the district court fortunately pronounced a much more temperate holding: The debtor is "required to demonstrate not only a current inability to pay, but additional circumstances which strongly suggest that the current inability to pay will extend for a significant portion of the repayment period of the loan." (In those days, the typical repayment period was 10 years).

Then the district court borrowed from other courts and sought "unique" or "exceptional" circumstances that might reflect upon the future of the debtor — circumstances such as illness of the debtor, the number of dependents, and special needs of dependents.

Finally, the district court, again borrowing from case law from other jurisdictions, said "It is proper to require a debtor to show that he or she has made good faith efforts to repay the loan and that the forces preventing repayment are truly beyond his or her reasonable control."

It is important to note that this writer fully agrees with the following statement by the district court in *Brunner:*

In connection with the showing of good faith and circumstances beyond the control of the debtor several courts have permitted debtors to discharge 64*64 their loans upon a showing that the education for which the loan paid has been of little use to them.... Consideration of this factor is not only improper, it is antithetical to the spirit of the guaranteed loan program. As described in more detail infra, the loan program grants aid regardless of the financial stability of the debtor or the wisdom of his or her individual choice to pursue further education. Consideration of the "value" of the education in making a decision to discharge turns the government into an insurer of educational value. Those students who make wise choices prosper; those who do not seek to discharge their loans in bankruptcy. This is wholly improper.

The courts which consider this factor seem to view it as a way to punish institutions for forcing on students loans which are not in their best interests.... Regardless of whether such an attitude is proper, [such] court's chosen remedy is ineffectual. The burden is borne not by the institution but by taxpayers, who absorb the cost of the default. As noted in [*In re Powelson,* 25 B.R. 274 (Bankr. D.Neb.)], a student loan is an investment, but it is for the borrower, not the taxpayers, to evaluate the wisdom of the investment and bear the risks and burdens if the investment proves improvident....

The effect of these requirements is to make student loans a very difficult burden to shake without actually paying them off. While this result may seem draconian, it plainly serves the purposes of the guaranteed student loan program. When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders, who may, after investigating their borrower's financial status and prospects, choose to deny as well as grant credit and may adjust the interest rate which they charge according to their judgment as to the likelihood of repayment. The government has no such luxury. It offers loans at a fixed rate of interest, and it does so almost without regard for creditworthiness. Indeed, because it bases its loan decisions in part on student need, it arguably offers loans selectively to the worst credit risks.

Because of this enlightened social policy, those whose past work or credit record might foreclose them from the commercial loan market are able to obtain credit at subsidized rates to advance their education. Those who might obtain loans only at exorbitant rates are similarly able to obtain low cost, deferred loans. In return for this largesse — and it is undeniable that guaranteed student loans have extended higher education to thousands who would otherwise have been forced to forego college or vocational training — the government exacts a *quid pro quo.* Through § 523(a)(8) it commits the student to repayment regardless of his or her subsequent economic circumstances. In return for giving aid to individuals who represent poor credit risks, it strips these individuals of the refuge of bankruptcy in all but extreme circumstances.... This is a bargain each student loan borrower strikes with the government.

Like all bargains, it entails risks. It is for each student individually to decide whether the risks of future hardship outweigh the potential benefit of a deferred-payment education.

This was well-stated, in this Court's view, and has often been applied here. (See *In re DeRose,* 316 B.R. 606; *In re* 65*65 *Doherty,* 219 B.R. 665; *In re Oswalt,* 215 B.R. 337 (Bankr.W.D.N.Y.1997); *In re Melton,* 187 B.R. 98 (Bankr.W.D.N.Y. 1995); *In re Kraft,* 161 B.R. 82 (Bankr. W.D.N.Y.1993).)

Having identified three bedrock principles, the district court examined the first one as it applied to Ms. Brunner.

Ms. Brunner's age was not known to the district court. The decision by that court was rendered in February of 1985. Ms. Brunner had entered college in 1972, and between 1972 and the time of the *lower* court's decision she had supported herself through a variety of full and part-time jobs, student loans, and educational stipends. She had no dependents. During the decade prior to the bankruptcy court hearing, her greatest annual income was $9,000.[8] When the bankruptcy court heard her case in 1983, her rent was $200 per month, she was receiving $258 per month in public assistance, $49 per month in food stamps, and Medicaid. The district court said this,

"She had been receiving this aid for approximately four months prior to the hearing [in the bankruptcy court]. Her testimony as to her source of support prior to that time was vague. At the time of the hearing [in the bankruptcy court], she possessed a bank account holding $200, but two months prior to the hearing she withdrew $2400 from her savings to purchase a used car. Upon her filing for bankruptcy four months prior to the hearing, her student loans constituted 80% of her total indebtedness."

The present Court finds it important that the district court in *Brunner* then stated this:

Appellee [Ms. Brunner] testified that she had sent out "over a hundred" resumes in search of employment *in her chosen field of work* but was unsuccessful. She noted that many of her classmates found themselves similarly unable to find such jobs. The extent to which she had attempted to find work *outside* her field was unclear. In response to her lawyer's inquiry [before the bankruptcy court] as to whether she had sought clerical or other jobs, she replied, "I don't have secretarial skills, but I have applied *for any position that I could find.*" *She did not recount any specific jobs which she had sought and been refused.* On cross-examination she conceded that she had done clerical work in the past. Although appellee was seeking a therapist for treatment of anxiety and depression due in part to her unemployment, she testified that she was capable of working.

In a brief oral ruling, the bankruptcy judge found that "she is not presently employed; prospects in the future do not look bright ... there does not appear to be any great demand for psychologists or social workers, or at the least ... there is not anything available. She has a psychological impairment, as well as a lack of future employment opportunity.... I find ... that the paucity of income that the debtor receives from public assistance would not be available to her to repay, and it would work an 66*66 undue hardship upon her to have to dip into those funds." As a consequence, the judge discharged the loans. [Emphasis added.]

Then the district court in the *Brunner* case rejected as "clearly erroneous" the bankruptcy judge's finding that Ms. Brunner possessed a "psychological impairment." There was no evidence in the record that her depression and anxiety impaired her capacity to work. The *district* court said "*she has no `impairment' in any relevant sense of the word.*"

Having set aside the bankruptcy court's finding in this regard, the district court said that Ms. Brunner

"appears to be a woman who is unlikely to find a job in her *chosen* field of work in the near future. However, she is an apparently healthy, presumably intelligent, and well-educated woman. Although she claimed to be unable to find any other type of work, the evidence presented at the hearing is too thin to support a finding that her chances of finding any work at all are slim, and I do not read the bankruptcy judge's decision as so finding. She has no dependents or any other extraordinary burdens which would impair her finding other work, or, once it is found, making it unlikely that she can both support herself and pay off her student loans." [Emphasis added.]

Next the district court in *Brunner* made successive findings that some scholars might say should have ended the inquiry at *each* point. First the district court stated: "In short, [Ms Brunner] *at most* proved that she is currently — or was at the time of the [bankruptcy court] hearing — unable both to meet her minimal expenses and pay off her loans." In a lengthy footnote, the district court stated that

"the bankruptcy judge failed to require, and [Ms. Brunner] failed to submit, a statement of expenses and income. The testimony at the hearing, accepted at face value, indicates that [Ms. Brunner] had been surviving for several months on monthly income of $107 in food stamps and cash above the cost of her rent. From this $107 appellee must have paid for food, clothing, utilities, entertainment, and the costs of registering, insuring, and maintaining a $2400 car. It seems *incredible* that this sum could stretch so far, *indicating that [Ms. Brunner] had sources of income which she failed to reveal.* It must be remembered that although [Ms. Brunner's] budget was thin, she nevertheless felt financially secure enough to spend her life savings on a car one to two months prior to the hearing." [Emphasis added.]

That might have ended the matter. The district court nonetheless chose to presume that Ms. Brunner passed the first prong, and proceeded to the second prong that it had formulated. It stated "that satisfying the first prong" (which Ms. Brunner was only *assumed* to have accomplished) cannot support a finding that the failure to discharge her loans will impose "undue hardship." The lead case cited for that proposition was the unfortunate *Briscoe* case, but the analysis proceeded.

The court found that "Nothing in the record supports a finding that it is highly likely that her current inability to find any work will extend for a significant part of the repayment period[9] of the loan or that she has `*a total incapacity now and in the future to pay her debts for reasons not* 67*67 *within her control.*' She is skilled, apparently capable, well, and without dependents." [Emphasis added.] This became the second prong of the *Brunner* Test.

Then came the third prong. The district court said "Nor has she adequately demonstrated good faith in attempting to pay off her loans. She filed for discharge within a month of the date the first payment of her loans became due. She has made virtually no attempt to repay, nor has she requested a deferment of payment, a remedy open to those unable to pay because of prolonged unemployment.... Inasmuch as this is her primary reason for requesting discharge, *initial* resort to the less drastic remedy of deferment would have been more appropriate than bankruptcy." [Emphasis added.][10]

If the test formulated by the district court was such that a debtor's failure to pass any one of the three prongs would defeat discharge of the debt, then Ms. Brunner's case could have been thrown out for default on the briefing schedule, or for failure to satisfy what eventually became the "first prong" of the *Brunner* test (because her budget was "incredible"), or because she had sought bankruptcy as a first resort rather than a last resort (what became the "good faith" prong of the *Brunner* test), or because she had not sought jobs outside her "chosen field" and so could not have satisfied what became the "second prong" of the *Brunner* test. But her case yielded a "three-pronged test" at the district court level.

Again, Ms. Brunner was *pro se,* and was not a lawyer, but the holding was later to become binding upon *every student loan borrower who has ever sought bankruptcy relief in the Second Circuit since 1987,* as discussed below.

This Court respects and admires the thoughtful scholarship and judicial temperance that formulated a useful rule for what might have been a constant question in the Southern District of New York. (In 1987 that District might have had the highest per capita share of student-loan debtors seeking discharge in bankruptcy.) Now, this Court must turn to the *Circuit* Court decision in *Brunner* to determine what binds this Court.

The decision rendered by the *Circuit* in 1987 is very brief. It was a one-page *per curiam,* with Ms. Brunner representing herself, *pro se.* The Second Circuit Court of Appeals stated:

"For the reasons set forth in the district court's order, we adopt [the district court's] analysis."

The Circuit Court went on, albeit briefly. It found the first prong to be a "reasonable" inquiry. Next, the Circuit Court also found it "reasonable" to require a showing of "additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time."

The Second Circuit, in this Court's estimation, then seems to have conflated the second and third prongs into something like a "totality of circumstances" test, although it could have ruled against Ms. Brunner on either one of those two prongs. It said:

The record then demonstrates no "additional circumstances" indicating a likelihood that her current inability to find any work will extend for a significant portion of the [ten year] loan repayment period. She is not disabled, nor *elderly,*[11] and she has, so 68*68 far as the record discloses, no dependents. No evidence was presented indicating a total foreclosure of job prospects in her area of training. In fact, at the time of hearing, only ten months had elapsed since Brunner's graduation from her masters program. Finally, as noted by the district court, Brunner filed for the discharge within a month of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment, a less drastic remedy available to those unavailable to pay because of the long unemployment period. Such conduct does not evidence a good faith attempt to pay her loans." [Emphasis added.]

IV. THE PRESENT CASE, AND FINDINGS AND CONCLUSIONS

The analysis above implies, if not demonstrates, that formulation of a three-prong test applicable to *every* student loan debtor who has ever sought relief in the bankruptcy courts of the Second Circuit since *Brunner* was not *required* under the facts of Ms. Brunner's case. Further, because there was no advocacy (by a lawyer or by any *amicus)* on behalf of student loan debtors in general, or Marie Brunner in particular, it is possible that countless such debtors whose budget was not "incredible" (as the district court found Ms. Brunner's budget to be), were done a disservice.[12]

To repeat the five questions to be answered in the present case, the case of Ms. Bene.

1. What at this time is a "minimal standard of living" under the first prong of *Brunner?*

2. What bearing does a long-past choice to forego education and the economic benefits it might provide toward the payment of outstanding student debt, have within the *Brunner* analysis?

3. What role does the availability of the current version of the William D. Ford Program play within the *Brunner* analysis as regards Ms. Bene?

4. How does the *Brunner* test apply to the fact that Ms. Bene, at age 64, faces imminent job loss?

5. Twenty-five years ago, the debtor's parents transferred $25,000 to her which she chose to devote to her parents' care. It was not in trust or as a gift, but rather it was to repay her for her past services to them. (A 1987 affidavit by her parents is in evidence as Defendant's Exhibit A.) She could have used it to pay off her student loans which already existed and by then totaled only approximately $14,500. Now that has grown to $56,300.00 because of accrued interest. How does that figure in to the *Brunner* analysis?

Answer to question 1. Clearly the Second Circuit did not equate "minimal standard of living" with "poverty." The Circuit unequivocally held that committing 69*69 a debtor "to a life of *poverty*" for an extended time into the "ten year loan repayment period" would constitute a hardship that is "undue." (Now the Debtor is offered a 25-year program to "satisfy," but not "repay" the debt.) The lender here (ECMC) argues that the "minimal standard of living" articulated in *Brunner* is the "Self-Sufficiency Standard" published by the Center for Women's Welfare. (That seems to be the standard used by certain non-governmental organizations and some governmental agencies to assess a person's or family's need for subsidy or other assistance. It seems that it has been adopted by pertinent agencies here in New York.) Under the current standard for this county, the self-sufficiency standard for Ms. Bene is $1676 per month, before taxes. Her current income is $1849.46 per month, before taxes. She earns $176.46 per month above that standard. ECMC consequently argues that Ms. Bene does not satisfy the first prong of the *Brunner* test, which is to say that it argues that she can afford to make payments on her student loans without falling below the self-sufficiency standard. Even if the Court accepts the premise that the "minimal standard of living" contemplated by the Second Circuit in *Brunner* is roughly equivalent to the published "self-sufficiency" standard, this argument is flawed because it ignores the fact that *Brunner* added service of the student loan debt to a debtor's expenses, while ECMC does not, *but for* Ford Program options for very low payments and eventual "satisfaction" of that debt, without full repayment. (This will be discussed more fully below.)

Answer to question number 2. As addressed earlier in this Decision, ECMC has argued that this Court's decision in the case of *In re Melton,* 187 B.R. 98 has been viewed by some courts to stand for the proposition that a pre-bankruptcy choice by a student loan debtor to become or to remain poor defeats a debtor's effort to discharge a student loan under any of the three prongs of the *Brunner* test, or all three of the prongs, no matter how noble that choice. (This relates to Ms. Bene's choice to end her education and devote her time to care of her parents, back in 1986.) ECMC argues that some debtors have lost their § 523(a)(8) cases as a result. No published decision to that effect has been found by this writer. Assuming that *unpublished* decisions to that effect have been rendered by some courts, the present court expresses regret. This writer failed in *Melton* to emphasize the difference between a pre-petition choice and a post-petition choice. Mr. Melton's household was "non-traditional." He lived with his girlfriend and her children and cared for them and provided for them. Under public assistance laws and regulations with which this Court has no familiarity, any effort by him to improve his earnings (and there was no barrier to that) would reduce the public assistance to his nontraditional "family unit." So *after* bankruptcy he chose not to work harder or longer to pay his student loan debt because additional earnings would reduce public assistance to his non-traditional family unit. In other words, he viewed it as a "wash" financially, and favored time with his loved-ones over repayment of his student loan debt.

This Court did not sustain that argument. In an effort[13] to explain its ruling, the present Court used the hypothetical of a physician who chooses to become a missionary 70*70 doctor and then seeks to discharge his or her student loans. What this writer failed to emphasize is the difference between *seeking to discharge the student loan debt in bankruptcy* or not so choosing. To be more specific, there are *three* "choices" involved. The first is the choice to become poor or to remain poor *after the borrowing.* The second is choosing to *seek discharge* of the student loans in *bankruptcy.* The third is how one chooses to live *after filing* for bankruptcy relief. The last presumes "options."

The first choice, if it temporally came before any consideration of bankruptcy, is forgiven in bankruptcy, especially if made twenty-four years before asking for discharge of student borrowing that was incurred before the choice to be poor was made. *One can hope for a future that will permit both the fulfillment of a noble choice and repayment of student loan debt.*

If one eventually suffers the need to seek relief from the bankruptcy court (the second choice), the third choice is the only important one. What shall he or she do in light of what the future may hold, given the discharge of other debt and the existence of student loan debt? Hypothetically (in *Melton* terms), the good doctor who became a missionary doctor could, *after* bankruptcy, choose to bring her great knowledge, of, say, illness in emerging regions, to a *salaried* position in an NGO, a governmental agency, a hospital, or into a private practice. This might permit payment of the student loans. The critical question is "Is there a higher paying option?"

The Debtor, here, Ms. Bene, has no option or choice now, and has not had such a choice for a very long time. She never got a degree. She has worked hard for 12 years on an assembly line, full-time. She makes $10.67 per hour — $3.17/hr. above the current minimum wage after 12 years on the job. At her age (64), with no degree and no special skills in evidence, there is no option that she might choose in order to improve her ability to repay $56,000 in student loan debt.[14]

Melton aside, there is also another substantial flaw in ECMC's logic. Its argument is that if Ms. Bene had chosen to complete her education rather than to care for her parents she would have succeeded to an extent that would have permitted her to repay the student loans. Perhaps she would have. Perhaps not. Maybe she would have become rich and famous, but maybe she would been injured in an accident on her way to a class and become a ward of the State. ECMC's arguments are far too speculative. This Court rejects any notion that a past choice, long ago, to terminate educational opportunities in order to care for parents more than 20 years before filing for bankruptcy relief has any bearing on a *Brunner* analysis.

Answer to question number 3. Until the Ford Program began to forgive the principal balance of the loan after 20 or 25 years of income-dependent payments, there was no need to evaluate it in the context of any of the three prongs of the *Brunner*analysis. The Court is of the impression that it was only in 2003 or so that Congress permitted forgiveness of unpaid student loan 71*71 debt after a student loan debtor agrees to lower payments over a period that is two or two-and-a half times longer than the 10-year period considered by the *Brunner* court.

The current version of the Program is, of course, the *second* most important development in the history of the effort to make higher or specialized education broadly available in our nation. The *most* important is the guaranteed student loan program itself. Some subsidized. Some not. National Defense Student Loans (later called National Direct Student Loans), Stafford Loans, Pell Grants, etc., have made it possible for many millions of persons who lacked financial means to obtain higher education or specialized training, whether in a vocation or a profession.

The nurse or doctor at one's bedside. The computer technician in one's office. One's child's teacher. The woman who was taught to haul a big rig that brings products to the shelves to be stocked. The musician in one's local concert hall. The studio engineer, the film maker, the community advocate, the geologist who analyzes one's land or water, the veterinarian, the social worker, the probation or parol officer, etc.

Were it not for the federally-guaranteed student loan programs, those persons might not be there. It all might have been left to economic forces that might not have met the need. Perhaps only the wealthy or creditworthy would have been available to offer to meet such needs.

The current version of the William D. Ford Program (with debt-forgiveness) recognizes that not everyone is able to complete an educational program on borrowed money, and that not everyone who does complete such a program succeeds to an extent that permits payment of the student loans. Prior to the current version of the William D. Ford Program, bankruptcy was the only option for such a borrower, and even bankruptcy was not an option to a student loan debtor who could not meet the "undue hardship" test.

The William D. Ford Program as it now exists[15] can implicate all three prongs 72*72 of the *Brunner* test. As argued by ECMC, it would add little monthly expense for Ms. Bene, who is marginally above the "self-sufficiency" standard, to make income-dependent payments on the debt. And so the first prong is implicated. The second prong is implicated because the Program is *flexible,* and can address what might befall Ms. Bene in the future, especially because she is 64 years of age and is facing impending job loss. The third prong is implicated because she has not previously availed herself of the opportunities offered by the Program, but rather has sought to discharge her student loans after paying less than $3,000 toward her student loans in the 20 years (or more) since they first became due.

V. CHANGES IN THE NOTION OF "POVERTY" AND "REPAYMENT PERIOD" SINCE *BRUNNER* REQUIRE CONSIDERATION BEFORE DECISION UPON QUESTIONS FOUR AND FIVE

It is possible that the Second Circuit was not aware that the district court's use of the term "poverty" in 1987 was problematic. The view that relegating a debtor to a life of "poverty" for the duration of the repayment period of a student loan would be an "undue hardship" probably seemed uncomplicated to any court at that time. However, by that time the term "poverty" had been under attack for decades[16] both inside and outside relevant government agencies. As noted before, Defendant ECMC has itself introduced evidence in this Court of what is known as the "Self-Sufficiency Standard," as adopted in the state of New York. It is higher than the H.H.S. Poverty Threshold. Ms. Bene is slightly above that standard currently, but only if one *excludes* what would have been the obligatory payments on the debt if repayment options today were the same as in 1987.

The Court accepts the request by ECMC that the Court take judicial notice of that standard. Looking to the sources of that standard offered by ECMC, the Court finds that it emanates from findings by the "Center for Women's Welfare." That institute has long-announced this:

> First conceived nearly five decades ago ... the official federal poverty level has now become out-of-date.
>
> The federal poverty level ... is based on U.S.D.A. food budgets that meet minimal nutritional standards. Because families in the 1950's spent an average of one-third of their income on food, it was assumed that multiplying the food budget by three would result in an amount that would be adequate to meet other basic needs as well. Since its creation, the [Federal Poverty Level] has only been updated for inflation. [Federal Poverty Level] thresholds reflect the number of adults and children, but they do not vary by age of children, nor by place.[17]
>
> 73*73 . . . .

Brunner focused on "poverty" as if that were an absolute term. It was not. Now this Court must discern the *meaning* of Brunner. The *words* are out-of-date.

First (in this regard), this writer agrees with the *dissent* in the case of *HHS v. Smitley* (4th Cir.2003) 347 F.3 109, which (to this writer) equated the first prong of *Brunner* ("minimal standard of living") to "a safe and decent standard of living," which that dissent equated with "average family ... income of *twice* the government-set poverty figure." (This writer has read and accepted the sources (although controversial) upon which that dissent rested its conclusion.) For Ms. Bene, *twice* the federal poverty level would be $21,780./yr. She earns $22,193.60/yr., gross. If one subtracts $5326/yr. from that to serve the student loan debt, she would pass the first prong of the *Brunner* test, but for the William D. Ford Program's relatively-new flexibility. And as to the "Self-Sufficiency Standard" of $20,108, she again passes the first prong, relative to the $5326/yr. cost to pay the debt in the "standard" (i.e., non-Ford) manner.

What of the phrase "repayment period"? The *Brunner* court at the district court level spoke of the bargain between the student and the student loan lender. Ms. Bene could have had no notion of the way that the statutory and regulatory landscape of student loan debts would change between the time she took out her last student loan in 1987 and the time that the current version of the Ford Program took effect.

To the *Brunner* Court it was very important that a student loan be viewed as a "bargain" between the student and the lender, but with the *risks* to be accepted by the *student* because it was statutorily hard to discharge a student loan. But that bargain changed from time to time by law by numerous amendments to § 523(a)(8). (As described at footnote 15 above, student loans were dischargeable in bankruptcy in 1987 so long as they had been due and payable for at least five years prior to the bankruptcy, regardless of "*hardship.*")

The "bargain" of which the district court spoke in the *Brunner* case, became a constantly-shifting "bargain" by the U.S. on a unilateral basis. The new *payment* options are clearly beneficial to all student loan debtors who do not need relief in this Court. However, such changes were not before the Circuit Court in *Brunner* in 1987. The present Court believes that the Circuit Court would hold that the this Debtor ought not be impossibly burdened by the "bargain" rationale that it approved in affirming the district court's focus on that concept. Consequently, this Court may now answer Questions 4 and 5.

Answer to question number 4. Ms. Bene faces job loss, and she is 64 years of age. She has worked on an assembly line for twelve years at an hourly wage less than $13.00/hr. In the Circuit decision in *Brunner* it was said that being "elderly" might satisfy the Second Prong, but that is not what this Court rests upon. (This writer is a bit older than Ms. Bene.) Rather, the Court finds that she has no prospect of financial improvement because that fact is proven by her twelve years on an assembly line and the fact that she never obtained a degree or professional diploma or license.[18] 74*74 (That she is 64 and faces job loss provides an alternative holding.[19])

Answer to question number 5. The Debtor's parents, in 1986, transferred all of their money to her as part of Medicaid or Medicare planning. It was $25,000. It was not a gift, but constituted money earned by her for her care of them. (This was established by a contemporaneous affidavit in 1986.) She chose to devote those monies to her parents' care rather than paying off her student loans, which then totaled approximately $14,500. (It is not disputed that she did expend those monies for her parents' care.)

Unless such a choice, so remote in time from any bankruptcy filing, is shown to be somehow fraudulent or "evasive" of the student loan obligation, the Court cannot but honor such a pre-petition choice. If this writer were to presume to be the debtor, and bankruptcy was not considered at the time, and this writer had to choose whether to devote what money this writer had to the care of his invalid parents or to paying off his student loan debt right away, this writer would have made the same decision that Ms. Bene did twenty-five years ago when there were still hopeful prospects for her own future. Prospects that would include repayment of the student loan. No worthy son or daughter could do otherwise. (Section 523(a)(8) is different from § 523(a)(1)(c) which implicates "tax evasion," and so has implicated financial opportunities to pay the tax in the past.) See, e.g. *In re May,* 251 B.R. 714 (8th Cir. BAP 2000).

She did not ask relief from this Court until twenty-five years later, after paying what she could, and even completing this Chapter 13 Plan to serve this debt alone.

VI. OBEDIENCE TO *BRUNNER*

The Court finds that the *Brunner* tests have been passed *but for* the changes in repayment options offered by the Ford Program. Whether this Court adopts the "totality of circumstances" test from other jurisdictions and scholarship, or adopts the "predictive model" of vertical "*stare decisis*" that this Court utilized in *In re Arway,*227 B.R. 216 (Bankr.W.D.N.Y.1998),[20] the result is the same. The Court chooses the "predictive model."

The Court finds first (under the "predictive model") that the Second Circuit Court of Appeals would conclude in this case that although the *Brunner Test* remains strong, a bankruptcy court must, after the 1987 *Brunner Test* is otherwise satisfied, look to the "totality of circumstances" to the extent that the current flexibility of the Ford Program is to be 75*75 reconciled with the *intent* of the *Brunner Test.*

Alternatively, the Court finds that *Brunner* is totally consistent with this Decision, given the evolution of words, and the growth of options for "satisfaction" (without "repayment") of student loans.

The statute itself obviously supposed a dynamic ("living") definition of "hardship." This Court finds that the Circuit Court in *Brunner* did so too.[21]

CONCLUSION

The words used 25 years ago in a binding decision of a higher court are subject to exegesis when the words are not legal terms of long standing.

A. When the Court adjusts for predictive changes in the *Brunner* Court's understanding of the sociological terms "poverty" and "minimal standard of living," and recognizes that the "repayment period" was 10 years in 1987 and now is 25 years, the Court finds that the Debtor has passed the *Brunner* test, *but for* interposition of the Ford Program changes that substitute "satisfaction" for "repayment."

B. This Court predicts that the Second Circuit would de-emphasize its focus on "the bargain" between a student loan borrower and the government, given the many ways in which the government has unilaterally changed its position in the past 25 years, and may re-shift in the Debtor's favor.

C. This Court predicts that the Second Circuit would look first to the *Brunner* test without regard to the current Ford Program options, and then look at those options only if a debtor passed the original *Brunner* Test.

D. This Court predicts that when a debtor passes the *Brunner* Test *but for* the Ford options, the Second Circuit would adopt a "totality of circumstances" test.

E. This Debtor has passed the *Brunner* Test, and now must face the "totality" presented by the current version of the Ford Program.

F. The following facts satisfy the "totality test:"

1. She is 64 and facing job loss.

2. She never had a profession.[22]

3. She has no debt other than 24-year-old student loan debt.

4. She gave up educational opportunities in order to care for her ill parents two decades ago.

5. She lives an austere life.

6. She has worked on an assembly line for 12 years at less than $13.00/hr. leading up to trial.

7. She never completed her education, and so has no options for higher income now.

8. She paid little toward her student loans, but paid what she could.

9. The $25,000 payment from her parents in 1986 could have paid-off her student loans, but she used it to care for her parents. There is nothing culpable about that in the Bankruptcy Code.

76*76 10. Finally, *Brunner* involved a debtor starting out on her career. (So did DeRose, albeit at age 50.) This Debtor is at the end of her "rope" at age 64, facing job loss and no prospects other than Social Security.

The 1978 legislative history regarding efforts to discharge student loan debt concerned "abuses" of the "bargain." (See fn. 15 above)

There is no abuse here.

To return to an earlier part of this Decision, *Collier* warned that changes in the Ford Program ought not to be viewed as an implied repeal of 11 U.S.C. § 523(a)(8). Rather, this Court must "decide how much personal sacrifice society expects from individuals who accepted the benefits of guaranteed student loans but who have not obtained the financial rewards they had hoped to receive as a result of their educational expenditures." (Collier on Bankruptcy, 15th Edition ¶ 523.14[2]). Ms. Bene has satisfied that standard.

This loan must be discharged.

The parties shall bear their own costs.

The Clerk shall enter judgment for the Debtor on the merits. The Debt to ECMC and its assignees is discharged.

SO ORDERED.

[1] This Court's decision in *In re DeRose,* 316 B.R. 606 (Bankr.W.D.N.Y., 2004) is distinguished on several bases. Ms. DeRose became a chiropractor at age 50, and discovered that she was earning not much more than she earned as a Registered Nurse before she borrowed, then she claimed her advanced age to satisfy the *Brunner* Test. This Court said "This case is highly unusual.... Nearly all of the [her student loan debt] never entered payment status before [she] filed her chapter 13 case." That aligned Ms. DeRose with Ms. Brunner, as we shall see. Discharge rather than an unwelcome burden. Bankruptcy as a first resort rather than a last resort. The present case is different in that and other ways, as explained below.

[2] One exception — a $25,000 lump-sum payment she received in 1986 and chose to devote to her parents' care — will be discussed later.

[3] It is important to note that the Second Circuit has never revisited *Brunner* in published opinions, although it observed in *In re Traversa,* 2011 WL 5110214 that the 3rd, 5th and 11th Circuits have adopted the "*Brunner* Test." In other words, any extrapolations upon *Brunner* in those other Circuits do not bind this Court, because the Second Circuit did not "adopt" them. But see footnote 12 below — the Circuit might have revisited *Brunner* in unpublished dispositions.

[4] The Ford Program is not privately funded or subsidized. There is no "Foundation" behind it. It seems that there was enacted a "new" name (as of 1993) for what was known as the National Direct Student Loan Program. (The renaming seemingly honors a long-term Congressman from Michigan who championed expanded educational opportunities for persons of lesser means, and who died in 2004, but had left Congress in 1995.)

[5] This is not a criticism of interest rates. It is simply a fact, 25-years-removed from the last borrowing in 1987.

[6] This Debtor currently is offered a 25-year-term under the Ford Program, making it harder for her to satisfy any prong of the *Brunner* test. Accepting the program will obligate her until she is 89 years of age, and even then she will not have "repaid" the debt; rather she will have "satisfied" the terms for a release as to the remaining balance.

[7] This writer's criticism of *Briscoe* has been published. See *In re Doherty,* 219 B.R. 665 (Bankr.W.D.N.Y.1998). When Congress added discharge of debts to the bankruptcy laws, it was borrowing from the Book of Deuteronomy. Deut. ¶ 15. It has become axiomatic that we are courts that provide a "fresh start" to an honest debtor. It is true that student loan debts are justly distinguished from the generality of contract debts because, among other things, they are available even to uncreditworthy people for their own self-improvement or that of their child, and they may be guaranteed at taxpayers' expense. But if Congress ever were to require this writer to instruct a student loan debtor that he or she must carry the burden of proving that he or she has a "certainty of hopelessness," this writer would retire. There would be no way to reconcile such a command with the notion of a "fresh start" for honest debtors. Some debtors, faced with such a standard, would not seek bankruptcy relief at all, but rather would choose to be discharged by the Highest Authority. (Suicide is found among those who are not permitted forgiveness of debt, and its fresh start.)

[8] In 1972, this writer, who graduated law school in 1971, accepted a job as a lawyer at $10,500 per annum here in Western New York. It was not an untypically low starting salary. Hence, Ms. Brunner's $9,000 year was not then as meager as it sounds now, unless that was earned closer to 1983 when the bankruptcy court ruled in her favor. (Perhaps she earned far less earlier.)

[9] Again, it was 10 years then. Now it is up to 25 years.

[10] This is a major distinction from the *DeRose* case, and will be more fully explained below.

[11] This Court could, but will not, base its decision in the present case upon the question of whether this 64-year-old Debtor is "elderly" or not, as discussed below. (It later does make an alternative holding in that regard.)

[12] It may be that on one or more occasions since the 1987 *Brunner* Decision the Circuit Court has been asked by competent counsel to reconsider the *Brunner* test, with competent briefs and arguments that truly illuminate the matters discussed above, and changed circumstances. If that has not happened, then it is time for a student loan debtor's counsel to present these matters to the Circuit Court. If it has happened, and the Circuit Court rejected cogent, current arguments in an unpublished Summary Affirmance of a lower court decision based upon the *Brunner* test, this Court would have no knowledge. As noted at footnote 3, above, the published decisions of the Second Circuit Court of Appeals merely note that three other Circuits have adopted the *Brunner* test.

[13] This was apparently not a totally persuasive effort, as this writer has been accused of a form of bias against poor unmarried family units. See A. Mechelle Dickerson, *Lifestyles of the Not-So-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy,* 45 Buff. L.Rev. 629 (1997).

[14] This also distinguishes *DeRose* from the case at Bar. Ms. DeRose achieved her goal. She became a chiropractor. It turned out to be not so lucrative as she thought. She was also a Registered Nurse. She had options that would enable her to close the gap between the $302.70 payments that would satisfy the Ford Program and the $182 that she paid in her Chapter 13 case. This Debtor, Ms. Bene, never achieved her professional goal (for good reasons that motivated her 24 years ago), *and*after 12 years on an assembly line, and facing layoff at age 64, has *no options.*

[15] The Court notes the ways in which Congress had changed "*the bargain*" emphasized so much by the district court in *Brunner,* by changing § 523(a)(8), many times over the course of many years.

In very broad terms, the history of and amendments to 11 U.S.C. § 523(a)(8) reflect an ongoing process of restricting dischargeability of educational loans.

11 U.S.C. § 523(a)(8) was originally enacted by the Bankruptcy Reform Act of 1978 to govern dischargeability of student loans. The enactment of the Bankruptcy Code repealed Section 439A of the Higher Education Act (which previously governed student loan dischargeability) and shifted standards for student loan discharge to the Code. 11 U.S.C. § 523(a)(8) made educational loans nondischargeable unless: (1) the loan first became due five years before the bankruptcy filing (excluding deferment periods) or (2) excepting the debt from discharge would impose an undue hardship.

Those dischargeability standards remained essentially undisturbed until 11 U.S.C. § 523(a)(8) was amended in 1990. Those amendments broadened the exception to discharge beyond government loans to include governmental educational benefit overpayments and obligations to repay stipends and scholarships. Significantly, they also extended the five year dischargeability period to seven years.

Congress again amended 11 U.S.C. § 523(a)(8) in 1998 to eliminate the seven year period, making all government educational loans nondischargeable, regardless of when they first became due. That change left "undue hardship" as the only basis for a debtor to discharge educational loans or benefits. That change applied to all *cases commenced* after October 7, 1998, consequently applying to loans*incurred before that date.*

11 U.S.C. § 523(a)(8) was further amended in 2005, broadening the discharge exception to include "any other educational loan that is qualified education loan" as defined in the Internal Revenue Code.

What is a student loan borrower to do while Congress keeps changing "the bargain" on a unilateral basis?

If Ms. Bene had been cunning, she might have filed for bankruptcy relief back when the age of her student loans might have resulted in discharge without a showing of "undue hardship."

Just recently it was reported that Sallie Mae advocates going back to the notion that five to seven years of "good faith" efforts to repay a student loan suffices. (Buffalo News April 15, 2012, p. C3)

[16] A nine-page summary of over 60 years of research (as of 1994) regarding the elasticity of the poverty line, written by Gordon Fisher, can be found at http://aspe.hhs.gov/poverty/papers/elassmiv.htm.

[17] Http://www.selfsufficiencystandard.org/standard.html.

[18] Again, the fact that Ms. *DeRose* became a chiropractor distinguishes *DeRose* from the present case. (This Debtor has been an assembly line worker for 12 years. Ms. DeRose is both an R.N. and Doctor of Chiropractic.) That is *not* to say that all failures to complete an educational program give a debtor a "leg up" in a *Brunner* analysis. Most of the "non-completion" in § 523(a)(8) cases that this writer has heard in the past 20 years hinged on medical aspects of Prong 2. Three cases come to mind because they came to trial. One student was raped at college, dropped-out, and now makes beds at a Hampton Inn, with constant mental health care. (Her psychiatrist testified at trial.) Another student was a Ph.D. candidate in mathematics, had a mental breakdown, and now manages a convenience store. The third student was diagnosed with and was undergoing treatment for bipolar disorder which limited her to low wage employment. Other such cases were resolved before trial. In many similar cases ECMC conceded dischargeability. In many other cases, debtors entered the Ford Program instead of going to trial.

Ms. DeRose will, hopefully, do well. This Debtor, Ms. Bene, seems to have no future prospects.

[19] If a higher court finds this Court in error in its analysis here, then this court finds that Ms. Bene falls under the "elderly" satisfaction of the second prong.

[20] *Arway* addressed an intervening U.S. Supreme Court decision, not an intervening change in a statute or in the Code of Federal Regulations.

[21] Again, if this decision fails on all other grounds, this Court finds that Ms. Bene is "elderly."

[22] Ms. DeRose was an R.N. earning over $30,000 per year before she decided (at age 45) to borrow to become a chiropractor.

Third Circuit Law

The Third Circuit adopted the *Brunner* test in *In re Faish*, below. There is a saying in the law relating to the facts of a case being unsympathetic leading to laws which are unjust as applied to other people: “Bad facts make bad law.” This is a good example of that. Faish, in the case below, had obtained a well-paying job with good job security and simply didn’t want to pay for the student loans that helped make that possible. Within two years of graduation, she filed for bankruptcy – with basically no justification.

This angered the judges. You can see that by the highly judgmental and arrogant language of the decision as well as the shallow and unfair reasoning. While we have no problem with the result in the *Faish* case itself, this sort of language, judgmentalism and arrogance infects many cases.

We suggest that you go to Google Scholar, click on the “How Cited” link, and look for the best cases you can find. Find as many cases in your jurisdiction that provide for discharge as possible, and plan to make your case look as much as possible like them.

In re Faish, 72 F. 3d 298 - Court of Appeals, 3rd Circuit 1995

72 F.3d 298 (1995)

In re Marjorie Jo FAISH, Debtor.
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY
v.
Marjorie Jo FAISH, Appellant.

No. 95-7178.

United States Court of Appeals, Third Circuit.

Submitted October 19, 1995.

Decided November 28, 1995.

Sur Petition for Rehearing January 16, 1996.

299*299 Marjorie Jo Faish, Harrisburg, PA, Pro Se.

K. Kevin Murphy, Pennsylvania Higher Education Assistance Agency, Harrisburg, PA, for Appellee Pennsylvania Higher Education Assistance Agency.

Before: SCIRICA, COWEN and ROTH Circuit Judges.

Submitted Pursuant to Third Circuit LAR 34.1(a) October 19, 1995.

OPINION OF THE COURT

COWEN, Circuit Judge.

In this case we must decide whether appellant Marjorie Jo Faish is entitled to have her student-loan obligation discharged in a Chapter 7 bankruptcy proceeding. If Faish can establish that repayment of her student-loan debt would result in "undue hardship" under § 523(a)(8)(B) of the Bankruptcy Code, she is entitled to have her entire debt discharged. 11 U.S.C. § 523(a)(8)(B).

The Bankruptcy Court for the Middle District of Pennsylvania, citing equitable considerations, held that Faish need repay only $15,000.00, less than half of her loan obligation. On appeal, the District Court for the Middle District of Pennsylvania, applying a modified version of the "undue hardship" test set forth in *In re Johnson,* 5 Bankr.Ct.Dec. 532 (Bankr.E.D.Pa.1979), reversed the bankruptcy court. The district court held that because Faish had failed to establish that the repayment of her entire student-loan obligation would impose "undue hardship," no discharge was appropriate here.

We must also decide what legal standard bankruptcy courts within the Third Circuit will now apply when they consider whether the facts presented give rise to "undue hardship," as that term is to be construed under § 523(a)(8)(B). This area of the law is presently in a state of considerable confusion, with bankruptcy courts within our Circuit 300*300 applying a broad range of standards.[1] For the reasons stated herein, we adopt the standard for "undue hardship" set forth by the Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395 (2d Cir. 1987) (*per curiam*). Pursuant to this standard, although different from the one applied by the district court below, we will affirm the district court's order that Faish's student-loan debt must be deemed nondischargeable in its entirety.

I.

Marjorie Jo Faish obtained a Master's Degree in Public Health and Community Health Services Administration from the University of Pittsburgh in 1989. To help defer the costs of her education, Faish obtained $31,879.31 in guaranteed student loans from the Pennsylvania Higher Education Assistance Agency ("PHEAA"). Under the terms of the loan agreements, Faish was required to commence payments on her student-loan obligation on October 1, 1991.

On September 27, 1993, Faish filed a Chapter 7 bankruptcy petition with the Bankruptcy Court for the Middle District of Pennsylvania. On the same day, Faish filed a complaint to determine the dischargeability of her student loan debt to PHEAA. A trial on the issue of dischargeability was conducted on December 22, 1993.

On July 12, 1994, the bankruptcy court rendered its decision, making the following factual findings. *See In re Faish,* No. 93-01686, slip op. at 2-3 (Bankr.M.D.Pa. July 12, 1994). Faish has a job working for the Commonwealth of Pennsylvania in the Department of Public Welfare, Bureau of Financial Operations, as a budget analyst. She earns a yearly gross salary of approximately $27,000.00. Faish does not own an automobile and commutes to and from work by bus. She has been unsuccessful in her pursuit of a higher-paying job.

Faish is thirty-years-old, unmarried and has an eleven-year-old son. Faish does not receive any child support payments from the father of her child. She is concerned about the quality of the neighborhood and school district that she lives in and is now saving money for an automobile and a new apartment in a better area.

Faish suffers from Crohn's disease, a chronic condition affecting the bowel. She also has back problems. The bankruptcy court found, however, that although Faish's health problems are "significant," they "are not interfering with her ability to work." *Id.*at 5.

Faish's original principal debt to PHEAA amounted to $31,879.31. From November 13, 1991, through June 2, 1993, Faish repaid $4,629.92 of her loan obligation. As of September 1993, Faish owed PHEAA $32,989.33. *Id.* at 2.

After setting forth these factual findings, the bankruptcy court observed that "[o]ur district court has adopted the test for undue hardship set forth in *In re Johnson*.... The *Johnson* test divides the undue hardship inquiry test into three prongs: a mechanical test, a good faith test, and a policy test." *Id.* at 4. Applying the first prong of the *Johnson* test, the bankruptcy court concluded that "Faish has failed to establish a lack of a financial ability to repay for the foreseeable future and therefore fails the mechanical prong of the *Johnson* test." *Id.* at 5.

Although the *Johnson* court expressly held that if a student-loan debtor fails to satisfy the mechanical test, "discharge of the student loan must be denied," *Johnson,* 5 Bankr.Ct.Dec. at 544, the bankruptcy court below went on to apply *Johnson*'s good faith and policy tests. As to the *Johnson* "good faith" test, the bankruptcy court found that Faish had "established a sufficient degree of good faith." *Faish,* No. 93-01686, slip op. at 301*301 6. However, Faish failed the "policy test" because "avoidance of the obligation was a significant consideration in the filing." *Id.*

Even though Faish had failed the *Johnson* "undue hardship" test, the bankruptcy court went outside the *Johnson* framework and considered what it deemed to be equitable considerations. The court cited a bankruptcy court decision from another jurisdiction, *Woyame v. Career Education & Management (In re Woyame),* 161 B.R. 198 (Bankr. N.D.Ohio 1993), as authority for the proposition that bankruptcy courts have "some latitude in the amount of the nondischargeability determination even where individual prongs of the *Johnson* test are not met on their face." *Faish,* No. 93-01686, slip op. at 7.

The bankruptcy court concluded that "[b]ased upon the equities involved, Faish will be given partial relief." *Id.* at 8.[2] The court observed that it was "especially influenced ... by Faish's need to support a young dependent, and her desire to accumulate some savings in order to provide a better life for him." *Id.* at 7-8. Accordingly, the bankruptcy court held that "$15,000.00 of Faish's student loan debt will be deemed to be nondischargeable, and the remainder of the obligation, including accrued and future interest, will be deemed to be dischargeable." *Id.* at 8.

On February 21, 1995, the District Court for the Middle District of Pennsylvania issued a memorandum opinion reversing the bankruptcy court. The district court expressly rejected the bankruptcy court's assumption that it was bound by *Johnson. Faish,* No. 94-1353, slip op. at 4 n. 2 (M.D.Pa. Feb. 21, 1995). The district court noted, however, that while it "would not rigidly confine itself to *Johnson*'s tripartite analysis," it would abide by *Johnson*'s "general framework." *Id.* at 4.

The district court observed that it was "the bankruptcy judge's step beyond *Johnson* which has given rise to PHEAA's appeal." *Id.* at 6. The district court then reviewed the propriety of the bankruptcy judge's consideration of equitable factors not contemplated by *Johnson*'s three-pronged inquiry. The court stated in *dictum* that "the bankruptcy court must be prepared to move beyond *Johnson* to the extent that the *Johnson* analysis fails to capture scenarios requiring some form of student debt relief to alleviate undue hardship." *Id.* at 7. However, "the circumstances necessary to justify discharge must be unusual, and the hardship faced in the event of full repayment must be substantial." *Id.* Citing Faish's favorable employment prospects, the court concluded that "the continued viability of governmentally guaranteed student loans is simply incompatible with discharging student debt on the instant facts." *Id.* at 7-8. Accordingly, the district court ordered that "Faish's student debt must be deemed nondischargeable in its entirety." *Id.* at 8. This appeal followed.

II.

We have jurisdiction under 28 U.S.C. § 158(d). Our review of the district court's interpretation of the Bankruptcy Code is plenary. *Leeper v. Pennsylvania Higher Educ. Assistance Agency,* 49 F.3d 98, 100 (3d Cir.1995); *In re Pelkowski,* 990 F.2d 737, 739 (3d Cir.1993). The debtor has the burden of demonstrating undue hardship. *Woodcock v. Chemical Bank, NYSHESC (In re Woodcock),* 45 F.3d 363, 367 (10th Cir.), *cert. denied,* ___ U.S. ___, 116 S.Ct. 97, 133 L.Ed.2d 52 (1995); *In re Roberson,* 999 F.2d 1132, 1137 (7th Cir.1993).

III.

Section 523(a)(8)(B) of the Bankruptcy Code provides as follows:

> 302*302 (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —
>
> . . . . .
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless —
>
> (A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an *undue hardship* on the debtor and the debtor's dependents;
>
> 11 U.S.C. § 523(a)(8)(B) (emphasis added).

Section 523(a)(8)(B) was passed as part of the Bankruptcy Reform Act of 1978. As one commentator has explained, the "undue hardship" exception of § 523(a)(8)(B)

is difficult to apply because the drafters of the Bankruptcy Code did not define undue hardship. The drafters said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor's circumstances. Looking for guidance in the undue hardship cases, the bankruptcy courts have shaped facts and circumstances tests of undue hardship by relying on the legislative history of section 523(a)(8).

Kurt Wiese, Note, *Discharging Student Loans In Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship,"* 26 Ariz. L.Rev. 445, 447 (1984) (hereinafter Wiese, *Undue Hardship).*

Examining the Congressional Record in order to discern the legislative purpose behind the enactment of § 523(a)(8)(B), we observed in *In re Pelkowski* that "the debate in the main focused on the twin goals of rescuing the student loan program from fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors." *Pelkowski,* 990 F.2d at 743. Thus, the *Pelkowski* court expressed agreement with the conclusion of the Court of Appeals for the Sixth Circuit that "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of educational loan programs." *Id.* (quoting *In re Merchant,* 958 F.2d 738, 742 (6th Cir.1992)).

The *Pelkowski* court held that "[t]he Congressional intent to eliminate debtor abuse of the educational loan program would apply both to single makers of loan notes and to comakers, whether students or their parents or other co-signers, as all may abuse the bankruptcy system or take advantage of legal loopholes." *Pelkowski,* 990 F.2d at 744. The court concluded that "Congress has revealed an intent to limit the dischargeability of educational loan debt, and we can construe the provision no more narrowly than the language and the legislative history allow." *Id.* at 745. *See* Darrell Dunham & Ronald A. Buch, *Educational Debts Under the Bankruptcy Code,* 22 Mem.St.L.Rev. 679, 702 (1992) (hereinafter Dunham & Buch, *Educational Debts*) ("Congress clearly intended that most educational debt still due within seven years of graduation should be nondischargeable.").

IV.

A.

Before we address the merits of Faish's petition, we must decide which of the several "undue hardship" tests should be applied in the present matter. As one commentator has explained, "[b]ankruptcy courts use a wide variety of tests to determine whether the debtor has demonstrated undue hardship. While these tests have received varying degrees of acceptance, no particular test authoritatively guides or governs the undue hardship determination." Thad Collins, Note, *Forging a Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8),* 75 Iowa L.Rev. 733, 744 (1990). Due to this lack of a "unified approach to undue hardship, litigants are in the difficult position of not knowing which standard will govern their case. Consequently, effective presentation of evidence on undue hardship is made difficult unless the jurisdiction has 303*303definitively and unequivocally adopted one test and a consistent set of determinative factors." *Id.* at 747. It is to this task that we now turn.

The three most prominent tests applied to determine whether the "undue hardship" exception of § 523(a)(8)(B) should be invoked are the *Johnson* test, the *Bryant* test and the *Brunner* test. The *Johnson* and *Bryant* tests have been described as "the two most prominent tests" bankruptcy courts have applied to decide whether the "undue hardship" exception should apply. Dunham & Buch, *Educational Debts, supra,* at 695. The *Brunner* test has been adopted by a majority of the Courts of Appeals that have specifically addressed the issue of what single standard should be applied to determine whether "undue hardship" exists under 11 U.S.C. § 523(a)(8)(B). *See* Brunner, 831 F.2d at 395 (setting forth the *Brunner* test); *In re Roberson,*999 F.2d 1132 (7th Cir.1993) (adopting the *Brunner* test); *see also Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman),* 25 F.3d 356 (6th Cir.1994),*cert. denied,* ___ U.S. ___, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995) (applying the*Brunner* test). We will now discuss in detail the content and respective merits of these three "undue hardship" standards.

1. The *Johnson* Test

The tripartite *Johnson* test was set forth by the Bankruptcy Court for the Eastern District of Pennsylvania in *In re Johnson,* 5 Bankr.Ct.Dec. at 532. The *Johnson* test provides as follows:

In determining whether the undue hardship exception entitles a specific debtor to discharge of his student loan, a court should rely on three tests:

(1) Mechanical Test: The court must ask: Will the debtor's future financial resources for the longest foreseeable period of time allowed for repayment of the loan, be sufficient to support the debtor and his dependents at a subsistence or poverty standard of living, as well as to fund repayment of the student loan? If the question is answered affirmatively, discharge of the student loan must be denied. If answered negatively, then the court must apply the good faith test:

(2) Good Faith Test: Here, the court asks two questions:

(a) Was the debtor negligent or irresponsible in his efforts to minimize expenses, maximize resources, or secure employment?

(b) If "yes," then would lack of such negligence or irresponsibility have altered the answer to the mechanical test?

If the answer to the first part of the good faith test is no, then the debtor should be discharged of the obligation to repay his student loan. However, if the answers to both parts of the good faith test are "yes," then a presumption against discharge is established—which may be rebutted by a negative answer to the third and final test.

(3) ... Policy Test: The court must ask: Do the circumstances — i.e., the amount and percentage of total indebtedness of the student loan and the employment prospects of the petitioner indicate:

(a) That the dominant purpose of the bankruptcy petition was to discharge the student debt, or

(b) That the debtor has definitely benefited financially from the education which the loan helped to finance?

If the answer to both parts of this question is a firm "no," then the debtor should be discharged from his student loan obligation. If the court answers "yes" to either part of the question, then discharge should be denied.

Id. at 544.

Johnson's tripartite analysis appears to be both unnecessarily complicated and unduly cumbersome. When *Johnson* is applied correctly, however, most petitions will be denied after the mechanical test is applied. Thus, in this sense, the *Johnson* test is in accord with our recognition of the Congressional objectives of preventing abuse of the bankruptcy process and protecting the financial integrity of the student loan program. *Pelkowski,* 990 F.2d at 743-44. Similarly, both the good faith and policy tests provide additional protection against abuse of the student loan program. The *Johnson* test, by its terms, contains no provision that would permit bankruptcy courts to negate a finding of nondischargeability based upon an assessment 304*304 of other "equitable considerations" that may be deemed to be relevant.

2. The *Bryant* Test

The *Bryant* test was set forth by the Bankruptcy Court for the Eastern District of Pennsylvania eight years after *Johnson* was decided. *In re Bryant,* 72 B.R. 913 (Bankr. E.D.Pa.1987). The *Bryant* court criticized the three-part *Johnson* test as "unfortunately complicated" and promulgated an alternative test for "undue hardship." *Id.* at 915 n. 2. The *Bryant* court explained its standard in the following terms:

> The test which we propose strives to place the element of objectivity into the process of decision-making in this area. We propose, as a starting position, to analyze the income and resources of the debtor and his dependents in relation to federal poverty guidelines established by the United States Bureau of the Census and determine the disagreeability of the student loan obligation on the basis of whether the debtor's income is substantially over the amounts set forth in those guidelines or not. If not, a discharge will result only if the debtor can establish "unique" and "extraordinary" circumstances which should nevertheless render the debt dischargeable. If the debtor's income is below or close to the guideline, the lender can prevail only by establishing that circumstances exist which render these guidelines unrealistic, such as the debtor's failure to maximize his resources or clear prospects of the debtor for future income increases. We feel that such a test will decrease, if not eliminate the resort to the unbridled subjectivity which seems to pervade many of the decisions in this area.
>
> *Id.* at 915. Elaborating upon its new "undue hardship" exception standard, the bankruptcy court observed that "[w]e find ourselves in disagreement with those courts which have denied discharges of student loans on the basis of whether any given expenses are justified, as these represent subjective value judgments concerning which we consider ourselves no better able to gauge than, generally, debtors themselves." *Id.* at 918.

We expressly reject and depart from this reasoning and analysis. The *Bryant* test's refusal (or at least extreme reluctance) to question whether certain expenses debtors have incurred can be justified seems inconsistent with Congress' dual legislative goals of "eliminat[ing] debtor abuse of the educational loan program" and "preserv[ing] the fiscal integrity of the student loan program." *Pelkowski,* 990 F.2d at 744. The *Bryant* test does not adequately account for the fact that one of the most common reasons student loan debtors find themselves in bankruptcy court is that their "subjective value judgments" are often (but not always) indicative of a spendthrift philosophy which a bankruptcy court should be competent to consider before discharging their student loans.

The *Bryant* court also expressed disagreement with the first inquiry of the *Johnson* "policy test," which asks if "the dominant purpose of the bankruptcy petition was to discharge the student debt." *Johnson,* 5 Bankr.Ct.Dec. at 544. The *Bryant* court declared that since "avoiding the consequences of debts is normally the reason for filing for bankruptcy ... the fact that the Debtor seeks to discharge almost exclusively student loan obligations ... should be irrelevant." *Bryant,* 72 B.R. at 915 n. 2. We disagree. The purpose behind the debtor's bankruptcy petition is not irrelevant in this context because one of the reasons that Congress enacted § 523(a)(8)(B) was in response to "reports of students discharging student loan debts after graduation and subsequently accepting high-paying jobs." Wiese, *Undue Hardship, supra,* at 446. *See* *Brunner,* 831 F.2d at 396 (Congress intended "to make the discharge of student loans more difficult than that of other nonexcepted debt."). For these reasons, we decline to adopt the *Bryant* test.

3. The *Brunner* Test

As the Court of Appeals for the Second Circuit has observed, before *Brunner* was decided there was "very little appellate authority on the definition of `undue hardship' in the context of 11 U.S.C. § 523(a)(8)(B)." *Brunner,* 831 F.2d at 396. Relying upon the reasoning of the district court below,[3] the *Brunner* court set forth the following three part test for the "undue hardship" exception:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" 305*305 standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period for student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id.

The Court of Appeals for the Seventh Circuit formally adopted the *Brunner* test in *In re Roberson,* 999 F.2d at 1132. In *Roberson,* both the bankruptcy court and the district court below had applied the three-part *Johnson* test. After expressly rejecting the *Johnson* test and giving the *Brunner* test its imprimatur, the Seventh Circuit described how the *Brunner* test should properly be applied.

The *Roberson* court observed that "[t]he first prong of *Brunner* requires an examination of the debtor's current financial condition to see if payment of the loans would cause his standard of living to fall below that minimally necessary." *Id.* at 1135. The court admonished that the other prongs of the *Brunner* test should not be examined if the first prong has not been satisfied. *Id.*

The second prong of the *Brunner* test requires "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." *Brunner,* 831 F.2d at 396. The *Roberson* court observed that this requirement "properly recognizes the potential continuing benefit of an education, and imputes to the meaning of `undue hardship' a requirement that the debtor show his dire financial condition is likely to exist for a significant portion of the repayment period." *Roberson,* 999 F.2d at 1135.

The third prong of the *Brunner* test is the good faith inquiry. The *Roberson* court noted that the question of good faith should only be reached if the debtor has satisfied the first two elements. *See id.* at 1136. The good faith inquiry is to be guided by the understanding that "undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from `factors beyond his reasonable control.'" *Id.* (quoting Comm'n on the Bankruptcy Laws of the United States, Report, [H.R.Doc. No. 137, 93d Congress, 1st Sess., Pt. II], at 140 n. 16).

The *Roberson* court rejected the second prong of the *Johnson* "policy test," which considers "whether the debtor `has definitely benefitted financially from the education which the loan helped to finance.'" *Id.* at 1136 (quoting *Johnson,* 5 Bankr.Ct.Dec. at 544). The court observed that "[s]uch an inquiry conflicts with the basic concept of government-backed student loans." *Roberson,* 999 F.2d at 1136.

The Seventh Circuit cited the Southern District of New York's statement in *Brunner* that federal student loan programs were not designed to "turn[] the government into an insurer of educational value." *Id.* (quoting *Brunner,* 46 B.R. 752, 756 n. 3 (S.D.N.Y. 1985)). Students who benefit from guaranteed loan programs normally "would not be eligible to receive any financing or only financing at a higher rate of interest...." *Roberson,* 999 F.2d at 1136. Since "[t]he decision of whether or not to borrow for a college education lies with the individual," it is "the student, not the taxpayers, [that] must accept the consequences of the decision to borrow." *Id.* at 1137.

We agree with the Seventh Circuit's analysis and we offer another criticism of the *Johnson* test. *Johnson* is needlessly verbose and multifaceted. Its multiple tests and the subsidiary questions required to be answered thereunder do not provide the required clear statement of what the law is. For these reasons, we decline to adopt the *Johnson* "undue hardship" test as the law of this Circuit.

B.

Of the three tests that we have considered, *Brunner* is the most consistent with the scheme that Congress established in 1978. The *Brunner* standard meets the practical needs of the debtor by not requiring that he or she live in abject poverty for up to seven years before a student loan may be discharged. On the other hand, the *Brunner* 306*306 standard safeguards the financial integrity of the student loan program by not permitting debtors who have obtained the substantial benefits of an education funded by taxpayer dollars to dismiss their obligation merely because repayment of the borrowed funds would require some major personal and financial sacrifices.

The *Brunner* test is the most logical and workable of the established tests. Analysis under *Brunner* is not hampered either by the flawed *Johnson* "policy test" or the unwarranted deference with which the *Bryant* test reviews the personal spending habits of student-loan debtors. *Brunner*'s concise formulation is both easier to follow and to apply than *Johnson*'s. We therefore hold that the *Brunner* "undue hardship" test must now be applied by bankruptcy courts within the Third Circuit.

V.

Brunner now provides the definitive, exclusive authority that bankruptcy courts must utilize to determine whether the "undue hardship" exception applies. Student-loan debtors have the burden of establishing each element of the *Brunner* test. All three elements must be satisfied individually before a discharge can be granted. If one of the requirements of the *Brunner* test is not met, the bankruptcy court's inquiry must end there, with a finding of no dischargeability. *See id.* at 1135. Equitable concerns or other extraneous factors not contemplated by the *Brunner* framework may not be imported into the court's analysis to support a finding of dischargeability. *See*Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S.Ct. 963, 969, 99 L.Ed.2d 169 (1988) ("whatever equitable powers remain in the bankruptcy courts can only be exercised within the confines of the Bankruptcy Code").

Applying the factual findings of the bankruptcy court below, we now must determine whether Faish has satisfied her burden of establishing that repayment of her student-loan obligation would impose an "undue hardship" upon her.[4] Applying the first prong of the *Brunner* test, we must determine whether Faish "cannot maintain, based on current income and expenses, a `minimal' standard of living for herself and her dependents if forced to repay the loans." *Brunner,* 831 F.2d at 396.

The bankruptcy court found that Faish was employed by the Commonwealth of Pennsylvania, Department of Public Welfare, Bureau of Financial Operations, as a budget analyst at the time of trial. She earned a gross yearly salary of $27,000.00 in 1993. The court found that "Faish's current employment and income were good," and that while "a payment to PHEAA of nearly $300.00 [per month] impacts significantly upon Faish's disposable income, it does not place her or her son below the subsistence level." *Faish,* No. 93-01686, slip op. at 5.

The first prong of the *Brunner* analysis requires more than a showing of tight finances. Faish has failed to establish through evidence presented at trial that, based upon her current income and expenses, she could not maintain a minimal standard of living if forced to repay her loans. Therefore, we conclude that Faish has failed to satisfy the first element of the *Brunner* test. Accordingly, we need not decide whether she would have satisfied the second and third elements of our new standard. We therefore hold that Faish's entire student-loan obligation is nondischargeable.

Although Faish has a steady job, she argues that her inability to find a job in her chosen field militates in favor of discharge. In response to a similar claim, the Southern District of New York in *Brunner* denied a discharge in bankruptcy to a student-loan debtor who was far less fortunate than Faish. The student-loan debtor in *Brunner* entered college in 1972. She received a "Bachelor's degree in Psychology in 1979 and a Master's degree in social work in 1982." *Brunner,* 46 B.R. at 756. Appellee Marie Brunner "testified that she had sent out `over a hundred' resumes in search of employment in her chosen field." *Id.* at 757. Nonetheless, upon graduation Brunner was unable to find work 307*307 and at the time of her hearing she had been supporting herself on public assistance for a period of four months. *Id.* In the decade prior to her bankruptcy hearing, Brunner's "greatest annual income was $9,000." *Id.*at 756.

Despite Brunner's inability to find work, the district court held that she had failed to satisfy the first prong of the *Brunner* test, which the court itself had just articulated. The district court observed that Brunner appears to be a woman who is unlikely to find a job in her chosen field of work in the near future. However, she is an apparently healthy, presumably intelligent, and well-educated woman. Although she claimed to be unable to find any other type of work, the evidence presented at the hearing is too thin to support a finding that her chances of finding any work at all are slim.... She has no dependents or any other extraordinary burdens which would impair her finding other work, or, once it is found, make it unlikely that she can both support herself and pay off her student loans.

In short, appellee at most proved that she is currently — or was at the time of the hearing — unable both to meet her minimal expenses and pay off her loans. This alone cannot support a finding that the failure to discharge her loans will impose undue hardship. (citations omitted). Nothing in the record supports a finding that it is likely that her current inability to find any work will extend for a significant part of the repayment period of the loan or that she has "a total incapacity now and in the future to pay [her] debts for reasons not within [her] control." (quoting *In re Rappaport,* 16 B.R. 615, 617 (Bankr.D.N.J. 1981)).

Id. at 757-58.

Today we adopt the reasoning of the Second Circuit. A comparison of the facts in *Brunner* and *Faish* is telling. The financial straits of the bankruptcy petitioner in *Brunner* appear to have been far more serious than any short-term, belt-tightening that may be required of Faish in order to repay her student-loan obligation.

Faish does not satisfy the standard that we set forth today. Moreover, full nondischargeability is especially appropriate here because, in essence, Faish was asking the bankruptcy court to allow a discharge of her student-loan obligation so that she could devote the money (which could otherwise have been earmarked for student-loan payments) to savings for the purchase of a new car and to settle into a new apartment. *Cf. Matthews v. Pineo,* 19 F.3d 121, 124 (3d Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 82, 130 L.Ed.2d 35 (1994) (NHSC scholarship recipient's "current income and ... expenses should [not] be regarded as unalterable. Instead, the proper inquiry is whether it would be `unconscionable' to require [the debtor] to take any available steps to earn more income or to reduce her expenses.").

VI. CONCLUSION

For the foregoing reasons, we adopt the *Brunner* "undue hardship" standard to determine whether student-loan debt can be discharged pursuant to 11 U.S.C. § 523(a)(8)(B). We further hold that Faish has failed to satisfy her burden to establish undue hardship under the *Brunner* standard and that her entire student-loan obligation is nondischargeable. The judgment of the district court will be affirmed.

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SAROKIN, Circuit Judges.

SUR PETITION FOR REHEARING

Jan. 16, 1996.

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

[1] The Bankruptcy Court for the Western District of Pennsylvania's recitation of the following bankruptcy court decisions that have developed separate tests "to determine whether the facts of a case constitute undue hardship" is indicative of the current uncertainty. *See In re Correll,* 105 B.R. 302, 305 (Bankr.W.D.Pa.1989) (citing *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395 (2d Cir.1987) (*per curiam*); *In re Conner,* 89 B.R. 744 (Bankr.N.D.Ill.1988); *In re Bryant,* 72 B.R. 913 (Bankr.E.D.Pa.1987); *In re Craig,* 64 B.R. 854 (W.D.Pa.1986); *In re Johnson,* 5 Bankr.Ct.Dec. 532 (Bankr.E.D.Pa.1979)).

[2] The bankruptcy court reached this conclusion despite its earlier findings that

Faish's current employment and income are good, as are her future employment and income prospects. Although a payment to PHEAA of nearly $300.00 impacts significantly upon Faish's disposable income, it does not place her or her son below the subsistence level. Indeed, Faish has managed to incorporate a savings component into her expenses, which is rare in my experience among debtors applying for dischargeability based upon undue hardship. Additionally, Faish's degree qualifies her for promotion and/or more favorable employment.

In re Faish, No. 93-01686, slip op. at 5 (Bankr. M.D.Pa. July 12, 1994).

[3] *See* 46 B.R. 752 (Bankr.S.D.N.Y.1985), *aff'd,* 831 F.2d at 395.

[4] We conclude that sufficient facts appear in the record to enable us to perform the *Brunner* analysis. Remand, therefore, is unnecessary.

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Fourth Circuit Law

The Fourth Circuit has adopted the Brunner standard in In re Ekenasi. This is another instance of "bad facts making bad law." Ekenasi was a Nigerian immigrant who moved from taxi driver to state-employed lawyer thanks to government loans. Along the way, he generated over $100,000 of credit card debt in addition to about $100,000 of student loans. He sought bankruptcy protection basically immediately upon graduation from law school, made a special deal regarding repayment of the unsecured debt based on the existence of the student loan debt, and then immediately after that tried to get rid of the student loan debt. In addition to that, Ekenasi had child support obligations that, as did his statements of what he could afford to pay, changed no apparent reason from time to time.

The court of appeals apparently thought that the bankruptcy court had been hoodwinked by Ekenasi – and our guess is that it was right. It is unfortunate, on the other hand, that the court felt the need to adopt the Brunner test for all bankruptcies based on this one, extreme, case.

In re Ekenasi, 325 F. 3d 541 - Court of Appeals, 4th Circuit 2003

325 F.3d 541 (2003)

In Re: Geoffrey Ifenay EKENASI, Debtor.
Geoffrey Ifenay Ekenasi, Plaintiff-Appellee,
v.
The Education Resources Institute; Pennsylvania Higher Education Assistance Agency, Defendants-Appellants, and
Debra A. Wertman, Trustee.

No. 02-1239.

United States Court of Appeals, Fourth Circuit.

Argued: February 24, 2003.

Decided: April 16, 2003.

542*542 ARGUED: Steven Leftridge Thomas, Kay, Casto & Chaney, P.L.L.C., Charleston, West Virginia, for Appellants. Andrew 543*543 Steven Nason, Pepper, Nason & Hayes, Charleston, West Virginia, for Appellee.

Before TRAXLER and SHEDD, Circuit Judges, and C. Arlen BEAM, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed by published opinion. Judge TRAXLER wrote the opinion, in which Judge SHEDD and Senior Judge BEAM joined.

OPINION

TRAXLER, Circuit Judge:

The Education Resources Institute and Pennsylvania Higher Education Assistance Agency ("Appellants") appeal an order of the district court affirming the bankruptcy court's order discharging Geoffrey Ifenay Ekenasi's student loan debts pursuant to 11 U.S.C.A. § 523 (West 1993 & Supp. 2002). Because we conclude that the bankruptcy court clearly erred in discharging Ekenasi's student loans more than two years before Ekenasi's scheduled completion of his confirmed Chapter 13 plan, we reverse.

I.

Ekenasi is a native of Nigeria. He obtained a degree in political science at the University of Lagos, Nigeria, in 1978. In the late 1980s, he emigrated to the United States. Upon arriving in this country, he worked briefly in a factory and, for several years, as a taxi driver in New York City.

While working as a taxi driver, Ekenasi learned that he could attend law school in the United States and pay for his postgraduate education through student loans sponsored by the federal government. He was accepted to the West Virginia University College of Law, enrolled in classes in 1992, and graduated on schedule in 1995. In 1997, Ekenasi passed the West Virginia bar examination and obtained a license to practice law in that state. All of this was made possible by his receipt of nearly $90,000 in government-sponsored student loans.

In August 1997, Ekenasi filed a petition for bankruptcy under Chapter 13 of the Bankruptcy Code and a proposed Chapter 13 Plan (the "Plan"). At the time, Ekenasi was employed as a paralegal with the West Virginia Tax Department, a temporary position he had accepted while studying to pass the bar examination and seeking employment as a licensed attorney. As a paralegal, Ekenasi was earning a salary of approximately $22,000 per year and a net monthly income of $1,480. He claimed total monthly expenses of $1,180, which included a $253 student loan payment. His petition also claimed six children of minority age who resided with him in the United States. Ekenasi estimated the non-priority, unsecured claims against him to be $89,418 in student loan debt and $55,494 in other unsecured debt, for a total of $144,912.

Based upon his income and expenses, *including* the $253 per month student loan payment, Ekenasi claimed excess income of $300 per month. He proposed to make scheduled payments in the amount of $300 per month to the bankruptcy trustee for 60 months for distribution towards his "general unsecured" (*i.e.,* non-student loan) creditors only, while continuing to make his student loan payment directly to the student loan creditors. The Plan proposed that "cause exist[ed]" to extend Ekenasi's payment of the debt "over a period of more than 36 months" due to Ekenasi's desire "to pay student loans outside [the Plan] and pay 27% of [the] general unsecured debt through the trustee." J.A. 46. *See* 11 U.S.C.A. § 1322(d) (West Supp. 2002) (providing that a Chapter 13 "plan may not provide for payments over a period 544*544that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years").

In February 1998, the bankruptcy court entered an order confirming Ekenasi's Chapter 13 Plan. Thus, Ekenasi's approved Plan, including its exception of the student loan creditors from any portion of the $300 payment made to the bankruptcy trustee, was premised upon his choice to continue making the student loan payment outside the Plan and directly to the student loan creditors. Ekenasi also obtained an extended payment period towards his other unsecured creditors by pointing to the very same choice.

Then, in May 1998, Ekenasi instituted this adversary proceeding, seeking a discharge of his student loan debts in their entirety on the basis that they imposed an undue hardship upon him. Since filing his Chapter 13 Plan, however, Ekenasi had passed the West Virginia bar examination and secured employment as an attorney with the West Virginia Bureau of Child Support Enforcement with a starting salary of $36,000 per year. In his complaint, Ekenasi represented that he was "unmarried but living in the same household as his ex-wife with his six (6) children ranging in age from four (4) years to seventeen (17) years old." J.A. 54. By 1999, Ekenasi's salary had increased to $39,899 and, by the time trial in the adversary proceeding commenced in December 2000, Ekenasi's salary had increased to $42,000 per year — nearly double the $22,000 salary he was earning when he filed his proposed Chapter 13 Plan claiming $300 in excess monthly income. Also by this time, two of the six children residing with Ekenasi in this country had achieved majority status. However, Ekenasi testified that he had three additional children (ages 18, 11 and 9) living in Nigeria who were dependent upon him for support and that he was subject to a Nigerian court order for such support in the monthly amount of $300 per child.

In January 2001, the bankruptcy court entered an order granting Ekenasi a complete discharge of his student loan debts based on undue hardship. Although noting that Ekenasi had the education necessary to practice law, the bankruptcy court found that Ekenasi's nationality and language skills "impose[d] a barrier to [his] practicing law in a private practice setting or in a corporate setting." J.A. 232. Additionally, the bankruptcy court found that Ekenasi had nine children who were dependent upon him for support, including three children in Nigeria to whom he was obligated under a foreign support order requiring him to pay $900 per month. Based primarily upon these factors, the bankruptcy court found that Ekenasi "[did] not possess a reasonable likelihood of an increase in income" and would not likely "have additional disposable income to utilize towards paying back these student loans" after he completed payments under the Chapter 13 Plan. J.A. 233. These findings were made approximately two years before the scheduled conclusion of Ekenasi's Chapter 13 Plan. The district court affirmed on appeal.

II.

Because the district court "act[ed] in its capacity as a bankruptcy appellate court, we review the bankruptcy court's decision independently." *Banks v. Sallie Mae Servicing Corp. (In re Banks),* 299 F.3d 296, 300 (4th Cir.2002). We review the bankruptcy court's factual findings for clear error and its legal conclusions de novo.*See* *Kielisch v. Educational Credit Mgmt. Corp. (In re Kielisch),* 258 F.3d 315, 319 (4th Cir.2001).

We begin with a brief summary of the Chapter 13 statutory provisions that are 545*545pertinent to the proceeding before us. *See* 11 U.S.C.A. §§ 1301-1330 (West 1993 & Supp.2002). As an alternative to liquidation under Chapter 7, Chapter 13 of the Bankruptcy Code allows a debtor to propose and file a plan for payment to his creditors from his regular income, *see* 11 U.S.C.A. § 1321, within certain parameters, *see* 11 U.S.C.A. § 1322. After the petition and plan are filed, and notice is given, the bankruptcy court conducts a hearing on confirmation of the plan, at which time any party in interest may object to confirmation. *See* 11 U.S.C.A. §§ 1324, 1325. A Chapter 13 plan may not exceed a period longer than three years, unless the bankruptcy court approves a longer period "for cause." 11 U.S.C.A. §

1322(d). The bankruptcy court, however, "may not approve a period that is longer than five years." 11 U.S.C.A. § 1322(d).

Once a debtor has satisfied his payments under the confirmed plan, the bankruptcy court grants the debtor a discharge of all debts provided for by the plan, *see* 11 U.S.C.A. § 1328(a), but not those debts which are nondischargeable under 11 U.S.C.A. § 523(a).[1] The debtor remains personally responsible for all such nondischargeable debts. *See* *In re Kielisch,* 258 F.3d at 318 n. 1; *Internal Revenue Serv. v. Cousins (In re Cousins),* 209 F.3d 38, 40 (1st Cir.2000).

Student loans, as a general rule, fall within the category of nondischargeable debts and pass through the bankruptcy process unaffected. *See* *In re Kielisch,* 258 F.3d at 320 (noting that Chapter 13 debtors ordinarily "remain personally responsible for their nondischargeable student loan debts, and those debts pass or ride through the bankruptcy unaffected and are a postbankruptcy liability of the former debtor") (internal quotation marks omitted). The federal government, under the Guaranteed Student Loan Program, "serves as guarantor of unsecured student loans and subsidizes interest payments on those loans." *In re Kielisch,* 258 F.3d at 319(internal quotation marks omitted). However, Congress has also provided that such government-guaranteed student loans are nondischargeable in bankruptcy proceedings unless the debtor can demonstrate that repayment of the loans would constitute an "undue hardship." 11 U.S.C.A. § 523(a)(8) (West Supp.2002).[2] The exception of such government-sponsored student loan debts from discharge in bankruptcy "`was enacted to prevent indebted college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves 546*546of the obligation to repay their student loans.'" *In re Kielisch,* 258 F.3d at 320 (quoting *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby),* 144 F.3d 433, 436-37 (6th Cir.1998)).[3]

In order to determine the dischargeability of student loans, the debtor must bring an adversary proceeding, *see* Fed. R. Bankr.P. 7001(6), and prove undue hardship, *see* 11 U.S.C.A. §§ 523(a)(8), 1328(a)(2). Although the bankruptcy code does not define "undue hardship," most courts have adopted a three-part test to determine whether a debtor has shown "undue hardship" within the meaning of § 523(a)(8). *See* *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395, 396 (2d Cir.1987) (per curiam). Under this test, the debtor must establish (1) that he cannot maintain a minimal standard of living for himself and his dependents, based upon his current income and expenses, if he is required to repay the student loans; (2) that additional circumstances indicate that his inability to do so is likely to exist for a significant portion of the repayment period of the student loans; and (3) that he has made good faith efforts to repay the loans. *See id.* at 396.

III.

We first address Appellants' contention that Ekenasi's adversary proceeding seeking a discharge of his student loan obligations as an "undue hardship" was premature. More specifically, they urge us to follow those courts that have held that student loan hardship cases are never ripe for adjudication in a Chapter 13 case until near or at the time of completion of the Chapter 13 plan. *See* *Pair v. United States (In re Pair),*269 B.R. 719, 720-21 (Bankr.N.D.Ala.2001); *Soler v. United States (In re Soler),* 250 B.R. 694, 697 (Bankr.D.Minn.2000); *Raisor v. Education Loan Servicing Ctr., Inc. (In re Raisor),* 180 B.R. 163, 167 (Bankr.E.D.Tex.1995). Appellants argue that this interpretation is implicit in the language of §§ 1328 and 523(a)(8), which focuses on the debtor's circumstances at the point of discharge. Ekenasi, on the other hand, urges us to follow those cases that allow a debtor to seek a hardship determination at any time of his choosing. He contends the debtor may choose "the date of the `snapshot' which the [c]ourt must examine for *Brunner* purposes." *Goranson v. Pennsylvania Higher Educ. Assistance Agency (In re Goranson),* 183 B.R. 52, 56 (Bankr.W.D.N.Y.1995); *see* United Student Aid Funds, Inc. v. Taylor (In re Taylor),223 B.R. 747, 751 (B.A.P. 9th Cir.1998).

As Appellants correctly observe, the *Brunner* factors, which were developed in the context of an adversary proceeding brought to discharge student loan obligations at the conclusion of a Chapter 7 proceeding, do not transfer neatly to an adversary proceeding brought to discharge student loan obligations in the midst of the debtor's attempts to comply with a confirmed Chapter 13 plan. *Brunner* requires the debtor to establish that he "cannot maintain, *based on current income and expenses,* a `minimal' standard of living" for himself and his dependents if he is forced to repay the student loans and that this condition will "likely ... persist for a significant portion of the repayment period of the student loans." *Brunner,* 831 F.2d at 396 (emphasis added).

547*547 In a Chapter 7 case, the bankruptcy proceeding is short-lived and the debtor achieves a quick discharge of his unsecured, dischargeable debts. Thus, predicting whether the debtor's current inability to maintain a minimal standard of living will persist throughout a significant portion of the repayment period is based upon a known, current situation. Where an adversary proceeding seeking a discharge of student loan obligations is brought early in a Chapter 13 case, however, the question of whether the debtor will be unable to maintain a minimal standard of living throughout a significant portion of the repayment period must be premised upon a prediction of what the debtor's situation will be at the conclusion of the Chapter 13 plan which, as here, may extend up to five years.

Having carefully considered these problems, as well as other rationales underlying the opposing viewpoints that have developed on this issue, we decline to adopt a hard and fast rule which would preclude bankruptcy courts from ever entertaining a proceeding to discharge student loan obligations until at or near the time the debtor has completed payments under a confirmed Chapter 13 plan. The text of the pertinent statutes does not prohibit such an advance determination and, although cognizant of the policy concerns expressed by Congress in its refusal to discharge such loans, we can envision exceptional circumstances where the *Brunner* factors could be predicted with sufficient certainty in advance of the conclusion of a Chapter 13 proceeding. Nevertheless, while we do not preclude debtors from seeking a discharge determination of student loan debts prior to the completion of payments under a confirmed Chapter 13 plan, our cognizance of those policy concerns also counsels us to emphasize that it will be most difficult for a debtor, who has advanced his education at the expense of government-guaranteed loans, to prove with the requisite certainty that the repayment of his student loan obligations will be an "undue burden" on him during a significant portion of the repayment period of the student loans when the debtor chooses to make that claim far in advance of the expected completion date of his plan.

IV.

Thus, we turn to the bankruptcy court's application of the *Brunner* factors to Ekenasi's claim that repayment of his student loan obligations will constitute an undue burden upon him. For the reasons which follow, we conclude that the bankruptcy court clearly erred in finding that Ekenasi met his burden of establishing the *Brunner* factors and, therefore, erred in discharging the student loan obligations based upon the record before it.

A.

With the assistance of government-sponsored student loans, Ekenasi successfully achieved a postgraduate law degree in the ordinary three-year period, passed his state's bar examination, and received a state license to practice law in 1997. Ekenasi filed his Chapter 13 petition and proposed Chapter 13 Plan in August of that same year. According to Ekenasi's representations in that proceeding, he had an annual income of $22,000 per year, a net monthly income of $1,480 and, after payment of his expenses in the amount of $1,180 (*including* a $253 per month student loan payment), $300 in disposable income available to pay his *other* unsecured creditors. Although entitled to an automatic stay of his student loan obligation, *see* 11 U.S.C.A. § 362(a) (West 1993 & Supp.2002), Ekenasi proposed a plan that excepted his student loan creditors from any portion of the $300 payment by proposing to pay the $253 student loan payment directly to those creditors. He also 548*548 obtained an extended 60-month payment period "for cause" by pointing to that same obligation. He obtained confirmation of the Plan in February 1998.

A mere three months later, in May 1998, Ekenasi filed this adversary proceeding, seeking a complete discharge of the student loan debt and, thereby, the $253 monthly payment. Also in 1998, Ekenasi secured employment as an attorney, an opportunity afforded by the very loans he now seeks to discharge. His annual income rose to $36,000 per year and, by the time of the trial in December 2000, had increased again to $42,000 — nearly double the income upon which the Plan was originally based. Ekenasi's net monthly income had increased from $1,480 to approximately $2,800. But, after eliminating any payment for student loans, Ekenasi claimed that his expenses had risen from $1,480 (a figure which included the bankruptcy payment) to $3,831. Ekenasi had apparently not been making the $253 monthly student loan payment, but testified at trial in December 2000 that he was current on his $300 monthly bankruptcy payments to the trustee in his Chapter 13 case.

Presented with this evidence, we are satisfied that the bankruptcy court clearly erred in finding that Ekenasi had sufficiently proven that he would be unable, two years in the future, to maintain a minimal standard of living for himself and his dependents for a significant portion of the repayment period of the student loan.

The evidence of Ekenasi's projected income and expenses is simply too speculative to substantiate the findings made by the bankruptcy court on this issue. For example, at the time of the adversary proceeding, Ekenasi claimed responsibility to pay $900 a month pursuant to a Nigerian court support order for his three children living in that country. However, he testified during the adversary proceeding that he was not fulfilling that obligation.[4] Ekenasi also claimed that all nine children were dependent upon him for support, and that he received no financial assistance from their mothers, yet he testified that he claimed only two dependents on his 1997 federal tax return, three dependents on his 1998 tax return, and three dependents on his 1999 tax return.

The speculative nature of the bankruptcy court's findings at the time are also highlighted by the circumstances that now exist, if we presume that Ekenasi has remained current in his Chapter 13 Plan payments since the adversary proceeding. Ekenasi will have completed his obligations under the Plan to his general unsecured creditors and will be eligible for a 549*549 discharge of those debts in their entirety. Three of his six children living in this country have reached majority-age status, leaving only three minority-age children (ages 9, 11, and 15) in this country currently dependent, or partially dependent, upon Ekenasi for support. We can presume that his oldest child living in Nigeria is also 18 years old; the other two are 11 and 9 years of age.

Finally, we note Appellants' argument that Ekenasi's situation in many ways represents the very abuses that Congress sought to prevent in prohibiting the discharge of student loan obligations. These abuses are particularly apparent where, as here, the student loan obligations have actually resulted in an educational opportunity that has likely enhanced the student's monthly earning potential to a level that exceeds the monthly obligation associated with the very education that created that potential.

B.

We also conclude that Ekenasi failed to prove that he "has made good faith efforts to repay the loans," *Brunner,* 831 F.2d at 396, and that the bankruptcy court clearly erred in finding otherwise. Of particular note, Ekenasi obtained approval of the Chapter 13 Plan to pay $300 in disposable income to unsecured creditors other than student loan creditors based upon his election to pay $253 to the student loan creditors outside the Plan. Although he presented evidence of his good faith attempts to pay the student loan payments *prior to* filing his Chapter 13 petition and Plan, he has not presented such evidence of a good faith attempt to make the student loan payments he included in the confirmed Chapter 13 Plan. Instead, Ekenasi filed the adversary proceeding to discharge the student loan debt in its entirety within a mere three months of obtaining that confirmation. *Cf.* *Brunner v. New York State Higher Educ. Servs. Corp. (In re Brunner),* 46 B.R. 752, 758 (S.D.N.Y.1985) (finding that debtor failed to establish good faith in a Chapter 7 proceeding where she "filed for discharge within a month of the date the first payment of her loans came due ... [,] made virtually no attempt to repay, [and never] requested a deferment of payment").

C.

To conclude, although we decline to hold that Chapter 13 precludes a bankruptcy court from ever entertaining an adversary proceeding to discharge student loan debts until at or near the time that the debtor completes payments under a confirmed Chapter 13 plan, we are satisfied that the bankruptcy court clearly erred in finding that Ekenasi had established undue hardship under *Brunner* upon the record before it. After emigrating to this country, Ekenasi sought and obtained a post-graduate, specialized education made possible by government-sponsored student loans. As a result of his education, he made a successful career transition from taxi driver to state-employed attorney. His financial circumstances are serious, especially given his paternal obligations. However, it does not appear that they are more serious or dire than they were before he entered law school. Although the record on this point is not as developed as it should be, we must assume that Ekenasi is earning a higher monthly income as a state-employed attorney than he was earning as a taxi driver and, therefore, that he is not in a financially worse position than he was when he entered law school, even excepting the scheduled student loan payment. In other words, the financial benefit of his higher education may well be more than sufficient to cover the financial obligation associated with it. This is not to say that he may not obtain a partial or total discharge of those debts, but it was indeed premature under these circumstances for 550*550 the bankruptcy court to find that Ekenasi would not be able to repay at least a portion of the loan that had helped improve his earning potential. If we do not demand at least a fair inquiry into this question, we risk encouraging those in difficult financial situations to utilize government-sponsored student loans to achieve higher income without any concomitant accountability to repay that which enabled that achievement.

V.

For the foregoing reasons, we reverse the district court's decision affirming the bankruptcy's discharge of Ekenasi's student loan debt owed to Appellants.

REVERSED

[1] The Chapter 13 statutory scheme provides that:

(a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt —

. . .

(2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title. . . .

11 U.S.C.A. § 1328(a) (West Supp.2002).

[2] Section 523(a) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents....

11 U.S.C.A. § 523(a)(8) (West Supp.2002).

[3] Originally, the nondischargeability of student loans applied only to Chapter 7 bankruptcies, which had the effect of providing debtors with an incentive to file Chapter 13 plans and discharge their student loan debts at the conclusion of the plan payments without a showing of undue hardship. *SeeIn re Kielisch* 258 F.3d at 320. Congress eliminated this incentive when it amended the statute in 1990 to extend the nondischargeability of student loans to Chapter 13 filings. *See id.*

[4] Appellants alternatively contend that Ekenasi has no legal obligation to pay child support pursuant to the Nigerian court order because there was no evidence that the Nigerian support order was entered in West Virginia to entitle it to full faith and credit. We need not decide this issue. However, we do take note of its problematic nature. Ekenasi sought to rely, at least in part, upon the Nigerian support obligation as an expense which should be considered in determining whether he should obtain a discharge of his government-sponsored student loan debt. Ekenasi, however, did not include this expense in his Chapter 13 Plan. He also admitted at the adversary proceeding that he was not complying with the order and, to the extent he sent money for the support of his children in Nigeria, he did so through other family members and not pursuant to the order. If Ekenasi has a legally enforceable obligation in this country to pay the obligation in Nigeria — a fact that is far from clear in the record — then it would fairly be considered an expense to be weighed in the "undue hardship" analysis. However, it would be inappropriate for the bankruptcy court to consider a purported obligation to pay a foreign support order which is not legally enforceable and which is not being fulfilled in order to relieve Ekenasi of a legally enforceable obligation to pay student loan debts guaranteed by the federal government.

Fifth Circuit Law

Unfortunately, the Fifth circuit adopted Brunner in **In re Gerhardt.** In *Gerhardt*, the debtor was a professional musician who attended some of the best universities in the country, got an advanced degree in cello and a ***job as principal cellist for a state orchestra***. *His salary was too low to support himself*. The court opinion is full of self-righteous arrogance and includes a few very striking statements as well as one thing all litigants would be well to remember.

The Gerhardt court notes without irony that if only hardship were a measure, practically all professional musicians would qualify for loan discharge, then casually suggests that Gerhardt should get a night job teaching or as a cashier. In what should alarm artists and teachers everywhere, the court states that the law does not necessarily allow borrowers to choose low-paying professions and then claim hardship. Not a word about predatory schools that dispatch debt-laden musicians into lives of poverty. The court has no problem with them taking the money and keeping it.

Gerhardt also interprets the second part of the *Brunner* test to require "*additional circumstances" that "either were not present when the debtor applied for the loans or [have] since been exacerbated*." There is nothing in the bankruptcy law or even *Brunner* that suggests this requirement. The additional circumstances Brunner suggested were indications that the currently existing hardship would continue to exist into the future, not some sort of surprise that somehow would take a borrower off the moral hook for making a mistake. Bankruptcy does not require blamelessness or perfect wisdom of the people seeking it. The Gerhardt case flippantly ***would*** require it.

In re Gerhardt, 348 F. 3d 89 - Court of Appeals, 5th Circuit 2003

348 F.3d 89 (2003)

In the Matter of: Jonathon R. GERHARDT, Debtor.
United States Department of Education, Appellee,
v.
Jonathon R. Gerhardt, Appellant.

No. 03-30040.

United States Court of Appeals, Fifth Circuit.

October 23, 2003.

90*90 Eneid A. Francis (argued) and Stephen A. Higginson, Asst. U.S. Attys., New Orleans, LA, for Appellee.

M. Elizabeth Bowman (argued), Bowman & Howley, Gretna, LA, for Appellant.

Before REAVLEY, JONES and CLEMENT, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Over a period of years, Jonathon Gerhardt obtained over $77,000 in government-insured student loans to finance his education at the University of Southern California, the Eastman School of Music, the University of Rochester, and the New England Conservatory of Music. Gerhardt is a professional cellist. He subsequently defaulted on each loan owed to the United States Government.

91*91 In 1999, Gerhardt filed for Chapter 7 bankruptcy and thereafter filed an adversary proceeding seeking discharge of his student loans pursuant to 11 U.S.C. § 523(a)(8). The bankruptcy court discharged Gerhardt's student loans as causing undue hardship. On appeal, the district court reversed, holding that it would not be an undue hardship for Gerhardt to repay his student loans. Finding no error, we affirm the district court's judgment.

I. STANDARD OF REVIEW

We review the decision of a district court, sitting as an appellate court, by applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court. *In re Jack/Wade Drilling, Inc.,* 258 F.3d 385, 387 (5th Cir.2001). Generally, a bankruptcy court's findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Williams v. IBEW Local 520 (In re Williams),* 337 F.3d 504, 508 (5th Cir. 2003).

Whether courts review the "undue hardship" determination de novo is a matter of first impression in this circuit. A number of our sister circuits have confronted this precise issue, determining that the dischargeability decision is a question of law subject to de novo review. *See In re Long,* 322 F.3d 549, 553 (8th Cir.2003); *In re Rifino,* 245 F.3d 1083, 1086-87 (9th Cir.2001); *In re Brightful,* 267 F.3d 324, 327 (3d Cir.2001); *In re Hornsby,* 144 F.3d 433, 436 (6th Cir.1998); *In re Woodcock,* 45 F.3d 363, 367 (10th Cir.1995); *In re Roberson,* 999 F.2d 1132, 1137 (7th Cir. 1993); *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2d Cir.1987). Similarly, this court has held that determining dischargeability of a debt arising from a willful and malicious injury under 11 U.S.C. § 523(a)(6) is a question of law subject to de novo review. *In re Williams,* 337 F.3d at 508. The decision to discharge Gerhardt's debts represents a conclusion regarding the legal effect of the bankruptcy court's factual findings as to his circumstances. Thus, the district court correctly applied de novo review to the bankruptcy court's dischargeability holding, and this court applies the same standard on appeal.

II. UNDUE HARDSHIP TEST

This circuit has not explicitly articulated the appropriate test with which to evaluate the undue hardship determination. The Second Circuit in *Brunner* crafted the most widely-adopted test. *See In re Cox,* 338 F.3d 1238, 1241 (11th Cir. 2003); *In re Ekenasi,* 325 F.3d 541, 546 (4th Cir.2003); *Rifino,* 245 F.3d at 1087-88; *Brightful,* 267 F.3d at 327-28; *Roberson,* 999 F.2d at 1135-36. To justify discharging the debtor's student loans, the *Brunner* test requires a three-part showing:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.*Brunner,* 831 F.2d at 396.

Because the Second Circuit presented a workable approach to evaluating the "undue hardship" determination, this court expressly adopts the *Brunner* test for purposes of evaluating a Section 523(a)(8) 92*92 decision.[1]

A. Minimal Standard of Living

Under the first prong of the *Brunner* test, the bankruptcy court determined that Gerhardt could not maintain a minimal standard of living if forced to repay his student loans. Evidence was produced at trial that Gerhardt earned $1,680.47 per month as the principal cellist for the Louisiana Philharmonic Orchestra ("LPO"), including a small amount of supplemental income earned as a cello teacher for Tulane University. His monthly expenses, which included a health club membership and internet access, averaged $1,829.39. The bankruptcy court's factual findings are not clearly erroneous. Consequently, we agree with the bankruptcy court's conclusion of law, which we review de novo, that flows from these factual findings. Given that Gerhardt's monthly expenses exceed his monthly income, he has no ability at the present time to maintain a minimal standard of living if forced to repay his loans.

B. Persisting State of Affairs

The second prong of the *Brunner* test asks if "additional circumstances exist indicating that this state of affairs is likely to persist [for a significant period of time]."*Brunner,* 831 F.2d at 396. "Additional circumstances" encompass "circumstances that impacted on the debtor's future earning potential but which [were] either not present when the debtor[] applied for the loans or [have] since been exacerbated." *In re Roach,* 288 B.R. 437, 445 (Bankr.E.D.La.2003). This second aspect of the test is meant to be "a demanding requirement." *Brightful,* 267 F.3d at 328. Thus, proving that the debtor is "currently in financial straits" is not enough. *Id.* Instead, the debtor must specifically prove "a total incapacity ... in the future to pay [his] debts for reasons not within [his] control."[2] *In re Faish,* 72 F.3d 298, 307 (3d Cir.1995) (quoting *In re Rappaport,* 16 B.R. 615, 617 (Bankr.D.N.J. 1981)).

Under the second prong of the test, the district court correctly concluded that Gerhardt has not established persistent undue hardship entitling him to discharge his student loans. Gerhardt holds a masters degree in music from the New England Conservatory of Music. He is about 43 years old, healthy, well-educated, and has no dependents, yet has repaid only $755 of his over $77,000 debt.[3] During the LPO's off-seasons, Gerhardt has collected unemployment, but he has somehow managed to attend the Colorado Music Festival. Although trial testimony tended to show that Gerhardt would likely not obtain a position at a higher-paying orchestra, he could obtain additional steady employment in a number of different arenas. For instance, he could attempt to teach full-time, obtain night-school teaching jobs, or even work as a music store clerk.[4] Thus, no reasons out 93-123*93-123 of Gerhardt's control exist that perpetuate his inability to repay his student loans.

In addition, nothing in the Bankruptcy Code suggests that a debtor may choose to work only in the field in which he was trained, obtain a low-paying job, and then claim that it would be an undue hardship to repay his student loans. *See, e.g., In re Grigas,*252 B.R. 866, 875 (Bankr.D.N.H.) (concluding that a debtor could not satisfy the second *Brunner* prong when financial distress was self-imposed). Under the facts presented by Gerhardt, it is difficult to imagine a professional orchestra musician who would not qualify for an undue hardship discharge. Accordingly, Gerhardt "has failed to demonstrate the type of exceptional circumstances that are necessary in order to meet [his] burden under the second prong" of *Brunner. Brightful,* 267 F.3d at 330. Finding no error, the judgment of the district court is AFFIRMED.

[EDITOR'S NOTE]

[1] Both the bankruptcy court and district court applied the *Brunner* test to the facts of this case.

[2] Some examples of "additional circumstances" include "psychiatric problems, lack of usable job skills, and severely limited education." *Roach,* 288 B.R. at 445.

[3] Our analysis of the second *Brunner* prong inevitably overlaps to some degree with the third prong, which asks if the debtor has made a good faith effort to repay the loan. *Brunner,* 831 F.2d at 396. However, because we resolve this case under the second prong, it is unnecessary to explore the third prong in depth.

[4] This is not meant to be an exhaustive list of possible employment opportunities for Gerhardt, but instead merely seeks to illustrate other viable avenues for income.

Sixth Circuit Law

The Sixth Circuit has declined to adopt the Brunner test in In re Hornsby and other cases. Later cases have, as far as we know, continued to decline to "follow" Brunner, but they do cite it with approval (see, i.e., *In re Miller, 377 F. 3d 616 - Court of Appeals, 6th Circuit 2004*, so we would suggest further research for cases factually similar to yours if you are in the Sixth Circuit. We include Hornsby in this report because although it itself reverses a bankruptcy discharge, it refers to some favorable cases and is not an unreasonable ruling.

The debtors in *Hornsby* had a respectable income and, despite not scrimping very much, showed a surplus of $200 per month. Nevertheless, the debtors missed paying some bills and had not made any student loan payments. The bankruptcy court glossed over this, and the court of appeals was not satisfied by that. Reasoning that the bankruptcy court had wanted to give the Hornsby's a fresh start, it went through some interesting analysis of what a court's options might be to provide that. We do not believe that analysis was very clear, but we offer the case to give readers an idea of what courts have looked at and considered.

In re Hornsby, 144 F. 3d 433 - Court of Appeals, 6th Circuit 1998

144 F.3d 433 (1998)

In re: Steven Lynn HORNSBY; Teresa Lynn Hornsby, Debtors.
TENNESSEE STUDENT ASSISTANCE CORPORATION, Appellant,
v.
Steven Lynn HORNSBY; Teresa Lynn Hornsby, Appellees.

Nos. 96-6320, 96-6321.

United States Court of Appeals, Sixth Circuit.

Argued March 18, 1998.

Submitted March 18, 1998.

Decided June 9, 1998.

434*434 Teresa C. Azan (argued and briefed), Office of the Attorney General for the State of Tennessee, Tax Division, Bankruptcy Unit, Nashville, TN, Charles W. Burson, Office of the Attorney General, Nashville, TN, for Appellant.

Albert B. Merkel (briefed), Merkel & Tabor, Jackson, TN, for Appellees.

Before: KENNEDY and SILER, Circuit Judges; COHN, District Judge.[*]

Argued by Appellant March 18, 1998.

Submitted by Appellees March 18, 1998.

OPINION

COHN, District Judge.

This is a bankruptcy appeal. Chapter 7 debtors Steven and Teresa Hornsby sought discharge of approximately $30,000 of student-loan debt. The Tennessee Student Assistance Corporation (TSAC), which had guaranteed the loans, opposed discharge. The bankruptcy court determined that the 435*435 Hornsbys' student loans should be discharged pursuant to 11 U.S.C. § 523(a)(8)(B)[1] because repayment of the loans would constitute an undue hardship. After a remand for a specific finding as to whether the Hornsbys' financial circumstances were likely to improve, the district court ultimately affirmed the bankruptcy court's decision that the student loans should be discharged.

On appeal, TSAC asserts that the Hornsbys' financial situation is not so exceptional to entitle them to discharge of their student loans. For the following reasons, we will reverse.

I.

Steven and Teresa Hornsby are married and have three young children. On May 25, 1993, the Hornsbys filed a voluntary Chapter 7 petition. The Hornsbys had by that date accumulated more than $30,000 in debt, stemming almost entirely from student loans. The Hornsbys initiated an adversary proceeding to obtain a discharge of their student loans on grounds of undue hardship.

After conducting a dischargeability hearing, the bankruptcy court made the following findings of fact with respect to the Hornsbys' debt. The Hornsbys were college students from 1987 until 1992, during which time they applied for and received fourteen student loans. Ultimately, Steven received five and Teresa received six subsidized Guaranteed Student Loans in principal amounts averaging approximately $2000; Steven also received two supplemental, or unsubsidized, educational loans, while Teresa received one such loan, in principal amounts ranging from $1000 to $2000.[2] TSAC, which is a nonprofit corporation created to administer student assistance programs in Tennessee, guaranteed the loans. The Hornsbys attended a succession of small Tennessee state colleges. Both studied business and computers, but neither graduated. Although the Hornsbys received several deferments and forbearances on the loans, they ultimately defaulted prior to making any payments. At the time of the dischargeability proceeding, interest had accumulated on the loans such that Steven was indebted to TSAC for $15,058.52 and Teresa was indebted to TSAC for $18,329.15.

The bankruptcy court first concluded that the Hornsbys were not capable of paying their student loans and maintaining a minimal standard of living. At the time of the dischargeability proceeding, Steven was working for AT & T in Dallas, Texas; he made $6.53 per hour, occasionally working limited overtime hours. Teresa was employed by KinderCare Learning Center. Although she had begun work in Tennessee, she had transferred to become the director of a child-care facility in Dallas, Texas. Teresa was earning $17,500 per year with medical benefits at the time of the hearing. In monthly net income, Steven earned approximately $1083.33 and Teresa earned $1473.33, amounting to $2556.66 of disposable income per month.

The Hornsbys' reported monthly expenses came to $2364.90. The Hornsbys herefore 436*436 operated with a monthly surplus of $191.76 to $280.43, depending on whether Steven earned overtime for a particular month. TSAC argued that the Hornsbys did not "tighten their belts." The bankruptcy court found the Hornsbys' expenses to be reasonable. For example, the Hornsbys sold a car and incurred debt to purchase a newer used car, which then resulted in even more repair expenses. Although the bankruptcy court conceded that the new-car expenditure might have been ill-advised, the bankruptcy court found that they purchased the car in the good-faith belief that it would decrease their expenses. The Hornsbys also moved from Tennessee to Texas, thereby increasing their monthly rental expense by $200. The bankruptcy court found nothing wrong with the move, determining that while it was more expensive to live in Texas, the move was necessitated by a need for greater job security. TSAC further challenged the Hornsbys' relatively high bills for telephone use, electricity, meals eaten out, and cigarettes, which the bankruptcy court did not directly address.

Finally, TSAC argued that the Hornsbys' income well exceeded the standard for a family of five established in the Poverty Guidelines of the Department of Health and Human Services for 1993 and 1994. In 1995, the bankruptcy court acknowledged, the Hornsbys' projected income would exceed $36,000, while the 1995 poverty guideline for a family of five was $17,710.[3] Without elaboration, the bankruptcy court stated that it was well aware of the discrepancy but that the Hornsbys had understated their expenses. At the hearing, Steven had testified that, on four occasions over the past year, he had been unable to pay all bills because of unexpected expenses. The bankruptcy court therefore concluded that the Hornsbys could not pay their loans and maintain a minimal standard of living and, further, that their circumstances were not likely to improve. The bankruptcy court also found that the Hornsbys had acted in good faith: although they had not made payments toward the loans, they had exercised all deferment and forbearance options. The bankruptcy court ordered a discharge of student-loan debt totaling $33,387.67.

TSAC appealed the bankruptcy court's decision to the district court, which affirmed with respect to the Hornsbys' present inability to repay the loans but found that the bankruptcy court had impermissibly shifted the burden to TSAC in analyzing the Hornsbys' future prospects. The district court remanded the case for further findings as to the likelihood of the Hornsbys' financial situation improving. On remand, the bankruptcy court made additional findings of fact, chiefly finding that the earning capacity of Steven and Teresa Hornsby was likely to remain relatively constant for many years. Although the Hornsbys' day-care expenses might disappear over time, the bankruptcy court found that any additional money saved would not be significant. On appeal, the district court affirmed the bankruptcy court's findings.

II.

A decision that student loans impose an undue hardship "is a question of law subject to *de novo* review." *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359 (6th Cir.1994), *cert. denied,* 513 U.S. 1081, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995). The factual findings underlying the decision will be set aside only if clearly erroneous — in other words, if we are "left with the definite and firm conviction that a mistake has been committed." *See* *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); *see also*FED. R. BANKR.P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.").

III.

A.

The dischargeability provision at issue, § 523(a)(8), was enacted to prevent indebted437*437 college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves of the obligation to repay their student loans. *See* *Cheesman,* 25 F.3d at 359 (citing *Andrews University v. Merchant (In re Merchant)*, 958 F.2d 738, 740 (6th Cir.1992)).[4] Thus a debtor who has student loans which became due fewer than seven years before filing for bankruptcy must repay the loans unless she demonstrates that repayment would constitute an undue hardship. *See* 11 U.S.C. § 523(a)(8)(B). Congress has not defined "undue hardship," leaving the task to the courts. Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness. *See* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?,* 71 TUL. L.REV. 139, 149-53 (1996).

Courts have chiefly compensated for lack of a definition by devising tests to measure undue hardship. *See id.* at 149. Declining to adopt any one test, we instead look to many factors. *See* *Cheesman,* 25 F.3d at 359; *see also* *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir.1996).[5] We have considered the three factors set forth in *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 395 (2d Cir.1987) (per curiam), which is the test that has been most widely applied:

One test requires the debtor to demonstrate "(1) that the debtor cannot maintain, based on current income and expenses, a `minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period ...; and (3) that the debtor has made good faith efforts to repay the loans."

Cheesman, 25 F.3d at 359 (quoting *Brunner,* 831 F.2d at 396).[6] A bankruptcy court might also consider, among other things, "the amount of the debt ... as well as the rate at which interest is accruing" and "the debtor's claimed expenses and current standard of living, with a view toward ascertaining whether the debtor has attempted to minimize the expenses of himself and his dependents." *Rice,* 78 F.3d at 1149.[7]

B.

Although the bankruptcy court purported to apply the *Brunner* test of undue 438*438hardship, it did not engage in the meaningful inquiry required to evaluate either the Hornsbys' expenses or the extent to which their discretionary income could be applied to their student loans. Disregarding what appeared to be excessive expenses and income well in excess of the poverty guideline for a family of five, the bankruptcy court instead concluded that the Hornsbys' attorney had "understated" the estimated monthly expenses. The bankruptcy court also largely ignored the monthly budget surplus, noting that unexpected — and undocumented — expenses had prevented the Hornsbys from paying their bills four times over the preceding year. The bankruptcy court's analysis simply was not thorough enough to support a finding of undue hardship.

This is not to say that the Hornsbys are not financially burdened; moreover, they need not live in abject poverty before a discharge is forthcoming. *See* *Rice,* 78 F.3d at 1151 (finding that "the bankruptcy court must ascertain what amount is minimally necessary to ensure that the dependents' needs for care, including food, shelter, clothing, and medical treatment are met"). One bankruptcy court has recommended that "[w]here a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalanced, a hardship exists from which a debtor may be discharged of his student loan obligations." *Correll v. Union Nat'l Bank of Pittsburgh (In re Correll)*, 105 B.R. 302, 306 (Bankr.W.D.Pa.1989). While the Hornsby family income may be modest, the Hornsby family budget is not unbalanced. The Hornsbys operate with a surplus of approximately $200 per month, and their income puts them significantly above the poverty guideline for a family of five. *See Cheesman,* 25 F.3d at 359 (finding discharge where the debtors' "1992 gross income of $15,676 exceeded by only a slim margin the government's 1992 poverty income guideline of $13,950 for a family of four"). The Hornsbys further do not seem to have minimized expenses in every way possible. *See, e.g., Ammirati v. Nellie Mae Inc. (In re Ammirati)*, 187 B.R. 902, 907 (D.S.C.1995) (discharging student loans of a debtor who, although having income significantly above the poverty guideline level, also had medical expenses and showed that he "had done everything possible to minimize expenses and maximize income"), *aff'd* 85 F.3d 615 (4th Cir.1996). The bankruptcy court did not question what seem like an exorbitant bill for long distance telephone service or the Hornsbys' monthly bill of $100 for cigarettes.

In a rather conclusory fashion, the bankruptcy court also found that the Hornsbys had exhibited good faith efforts in managing their student loans, even though they failed to make a single payment. *See Healey v. Massachusetts Higher Educ. (In re Healey)*, 161 B.R. 389, 397 (E.D.Mich.1993). The bankruptcy court further did not support the finding that any present inability to pay would persist for a significant portion of the repayment period. As the debtor in *Rice,* the Hornsbys are "young as well as healthy, and in all likelihood [their] income will increase in the future." *Rice,* 78 F.3d at 1150. The Hornsbys' financial circumstances and management of their debts do not meet any test of undue hardship such to justify discharge of their student loan obligations.

C.

The motivation behind the bankruptcy court's decision to discharge the Hornsbys' student loans was apparently a belief that the Hornsbys were oppressed by their student loans and would be unable to make a "fresh start" without relief. *See Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934) ("Th[e] purpose of the [Bankruptcy Act] has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns *at the time of bankruptcy,* a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."). Although the bankruptcy court should not have discharged the Hornsbys' entire student loans, we believe it had the power to take action short of total discharge. We find this 439*439authority in 11 U.S.C. § 105(a),[8] which permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," so long as such action is consistent with the Bankruptcy Act. *See Securities and Exchange Comm'n v. United States Realty & Improvement Co.,*310 U.S. 434, 455, 60 S.Ct. 1044, 84 L.Ed. 1293 (1940) ("A bankruptcy court is a court of equity and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act." (citations omitted)). In a student-loan discharge case where undue hardship does not exist, but where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the Bankruptcy Act.[9]

The scope of equitable power in student-loan discharge cases is as yet undefined. In *Cheesman,* however, we recognized the bankruptcy court's power to stay its order of discharge as an exercise of the equitable powers codified in § 105(a). *Cheesman,*25 F.3d at 360-61 (affirming order staying discharge in order "to revisit the dischargeability issue in eighteen months"). In *Rice,* we found that a bankruptcy court had abused its equitable powers by discharging two-thirds of a debtor's student loans for the reason that such loans worked an "unconscionable hardship" upon the debtor's three young children. [*Rice,* 78 F.3d at 1151](). Yet we left unresolved the question of whether in other circumstances a bankruptcy court could discharge in part a nondischargeable student loan or grant other relief:

As a final matter, we stress that we find it unnecessary in this case to decide whether a bankruptcy court may, consistent with the Bankruptcy Code and/or [42 U.S.C.] § 292f(g), exercise its equitable powers to grant a partial discharge of a HEAL debt, for, as we have concluded, nondischarge of the full amount of Rice's debt is not unconscionable. We also note that this case does not require us to decide whether a bankruptcy court may exercise its equitable powers to grant other forms of relief from such debts. In *Cheesman,* we have already authorized postponement of the discharge determination under appropriate circumstances.

Id. at 1151-52. In *Rice,* we also noted various equitable remedies devised by bankruptcy courts. *See id.* at 1152 n. 9.

Neither have other circuits resolved the scope of a bankruptcy court's equitable powers in a student-loan discharge case. The Third Circuit seems to have implicitly recognized — and explicitly rejected — a bankruptcy court's order partially discharging student loans where the bankruptcy court based its decision on equitable considerations. *See* *Faish,* 72 F.3d at 307 (finding no undue hardship and noting that "full nondischargeability is especially appropriate here because, in essence, [the debtor] was asking the bankruptcy court to allow a discharge of her student-loan obligation so that she could devote the money ... to savings for the purchase of a new car and to settle into a new apartment"). In another case ultimately finding no undue hardship, the Seventh Circuit affirmed an order deferring repayment of student loans, noting that the debtor could reopen bankruptcy proceedings if circumstances should later suggest undue hardship. *See Roberson,*999 F.2d at 1138 ("If, upon the expiration of that deferment ... [the debtor's] financial condition has not improved as anticipated, he may file a motion requesting 440*440 the bankruptcy court reopen his case ...."); *see also* *Rice,* 78 F.3d at 1152 n. 9.

Where a debtor's circumstances do not constitute undue hardship as to part of the debt but repayment of the entire debt would be an undue hardship, some bankruptcy courts have partially discharged student loans even while finding the student loans nondischargeable. *See, e.g.,* *Griffin v. Eduserv (In re Griffin),* 197 B.R. 144, 147 (Bankr.E.D.Okla.1996) ("[I]t would be an `undue hardship' for the Debtors to pay any of the accrued interest and attorneys' fees associated with ... student loans."); *Bakkum v. Great Lakes Higher Educ. Corp. (In re Bakkum),* 139 B.R. 680, 684 (Bankr.N.D.Ohio 1992) ("The Court, at its discretion, may excuse any portion of the Debtor's student loan obligation which would create an undue hardship."). Some bankruptcy courts have found that the statutory language of § 523(a)(8)(B) does not authorize partial discharge, however. *See, e.g.,* *Skaggs v. Great Lakes Higher Educ. Corp. (In re Skaggs),* 196 B.R. 865, 866-67 (Bankr.W.D.Okla. 1996).[10]

Student-loan creditors have, at least on one occasion, urged that dischargeability does "not have to be an `all or nothing' choice and that an alternative remedy could be fashioned"; the bankruptcy court accordingly set a graduated repayment schedule balancing the debtor's impecunity with the creditors' rights to repayment. *Berthiaume v. Pennsylvania Higher Educ. Assistance Auth. (In re Berthiaume),* 138 B.R. 516, 521 (Bankr. W.D.Ky.1992) (directing a debtor with nondischargeable student loans to pay $65 per month with payments to increase to $100 on a specific date until the student loans were paid in full); *see also* [*Heckathorn v. United States* (*In re Heckathorn*), 199 B.R. 188, 196 (Bankr.N.D.Okla.1996)] (finding nondischargeability but delaying execution of debts for five years, declaring that further interest should not accrue for three years, and prescribing a repayment schedule). Although a few bankruptcy courts have rejected the position that they can restructure student loans,*see, e.g.,* [*Hawkins v. Buena Vista College* (*In re Hawkins*), 187 B.R. 294, 301 (Bankr.N.D.Iowa 1995),] one has effectively accomplished a partial discharge by treating each student loan separately and discharging those student loans that worked an undue hardship. *See* [*Hinkle v. Wheaton College* (*In re Hinkle*), 200 B.R. 690, 692 (Bankr. W.D.Wash.1996)] ("While a bankruptcy court cannot restructure the loans, there is no reason that it cannot treat each one separately for the purpose of dischargeability, if the loans have not been consolidated by agreement of the parties.").

Where a debtor's circumstances do not constitute undue hardship, some bankruptcy courts have thus given a debtor the benefit of a "fresh start" by partially discharging loans, whether by discharging an arbitrary amount of the principal, interest accrued, or attorney's fees; by instituting a repayment schedule; by deferring the debtor's repayment of the student loans; or by simply acknowledging that a debtor may reopen bankruptcy proceedings to revisit the question of undue hardship. We conclude that, pursuant to its powers codified in § 105(a), the bankruptcy court here may fashion a remedy allowing the Hornsbys ultimately to satisfy their obligations to TSAC while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances.

IV.

For the reasons stated above, the decision of the district court affirming the order of the bankruptcy court is REVERSED. The case is REMANDED for proceedings consistent with this opinion.

[*] The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The statute reads:

(a) A discharge under ... this title does not discharge an individual debtor from any debt —

* * * * * *

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless —

* * * * * *

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents. ...

11 U.S.C. § 523(a)(8)(B).

[2] These student loans have relatively low interest rates and are today available through the Federal Direct Student Loan (FDL) Program or the Federal Family Education Loan (FFEL) Program. "FDL and FFEL loans to students are collectively called Stafford Loans and can be subsidized (for low-income students) or unsubsidized (for others)."

Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy,* 4 AM. BANKR.INST. L.REV. 457, 459 (1996). The federal government pays accruing interest on subsidized loans while the student-debtor attends college or graduate school; interest accrues on an unsubsidized loan while the student-debtor attends school.

[3] *See* Annual Update of HHS Poverty Guidelines, 60 Fed.Reg. 7772, 7772 (1995).

[4] Evidence of such abuse may be anecdotal; the National Bankruptcy Review Commission (NBRC) states that "empirical evidence does not support the oft-cited allegation that changes in bankruptcy law entitlements — exemptions, dischargeability, or otherwise — affect the rate of filing for bankruptcy to obtain those benefits." NATIONAL BANKR.REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS § 1.4.5 (Oct. 20, 1997).

The NBRC was an independent commission created to prepare a report on issues in the Bankruptcy Code for submission to the President, Congress, and the Chief Justice. *See* Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, § 603, 108 Stat. 4106, 4147 (codified at 11 U.S.C. cmt. preceding § 101). The NBRC submitted its final report on October 20, 1997; having achieved its purpose, it ceased to exist.

Notably, the NBRC recommended that § 523(a)(8) be repealed because "[t]he bankruptcy system, through its network of exceptions to discharge, seems to penalize individuals who seek to educate and improve themselves while it liberates other individuals from overwhelming debt incurred for other purposes or through different means." REPORT OF NAT'L BANKR.REV. COMM'N, *supra,* at § 1.4.5. The NBRC saw an added benefit in repeal of § 523(a)(8)(B) in that "[l]itigation over `undue hardship' would be eliminated, so that the discharge of student loans no longer would be denied to those who need it most." *Id.*

[5] We have, however, expressed disapproval of a "policy" test examining "the failure to obtain or to benefit financially from the financed degree as a separate mitigating consideration in determining whether a student loan is dischargeable." *Rice,* 78 F.3d at 1150 n. 6.

[6] The Third and Seventh Circuits have formally adopted the*Brunner* test. *See* *Pennsylvania Higher Educ. Assistance Agency v. Faish* (*In re Faish*), 72 F.3d 298, 305-06 (3d Cir.1995), *cert. denied,* 518 U.S. 1009, 116 S.Ct. 2532, 135 L.Ed.2d 1055 (1996); *In re Roberson,* 999 F.2d 1132, 1135-37 (7th Cir.1993).

[7] *Rice* dealt with the "significantly more stringent" unconscionability standard applied in discharge of Health Education Assistance Loans ("HEAL loans"); this standard places a heavier burden on debtors seeking discharge. *See* *Rice,* 78 F.3d at 1149; *see also* 42 U.S.C. § 292f(g). The factors noted in *Rice*are also relevant in evaluating discharge of ordinary student loans.

[8] The statute reads in full:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

[9] *See* Thad Collins, Note, *Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend 11 U.S.C. § 523(a)(8),* 75 IOWA L.REV. 733, 736 (1990) (describing bankruptcy courts' departure from the "all-or-nothing construction of section 523(a)(8)(B) in an attempt to soften the harsh results of this interpretation" and concluding that "[i]mplicit in this practice of revising student loan debts is the notion that a rigid, all-or-nothing interpretation does not sufficiently or effectively address the array of facts and circumstances that appear before the courts").

[10] *See* Collins, *supra* note 9, at 761 (describing "close-call" student-loan discharge cases as suitable for equitable remedies such as partial discharge or loan restructuring but warning that "the practice is arguably an intolerable form of judicial lawmaking").

Seventh Circuit Law

The Seventh Circuit, in In Re Roberson, decided to apply the *Brunner* test. The language of Roberson is not promising, and Roberson has frequently been quoted in very bad decisions. On the other hand, Roberson was apparently deciding between two different types of tests for undue hardship, the "Johnson" test and the Brunner test. In choosing Brunner, it at least picked the lesser of two evils. The decision is full of quotable quotes like, "the government is not the guarantor of the value of the education" (or words to that effect) – and a complete blindness to the fact that it is the guarantor to the financial wealth of the purveyors of the education. This sort of blindness to the economic realities is not typical of the Seventh circuit, but they are like the other courts in that their allegiance is to money.

The facts in *Roberson* are pretty sad – as is so in most of these cases. Roberson got about $90,000 of student loans in sciences, but found more opportunity as a car factory worker. Then he was caught drunk driving a couple of times and lost his job. Then – he got divorced, lost his job, and got screwed in the divorce property division. He was essentially homeless and out of work, but still being hounded by the debt collectors. He declared bankruptcy. The bankruptcy court discharged the student loan debts, the district court reversed that because it didn't think Roberson had proved that his case was "completely hopeless." He could be fine in a couple of years when he got his license back and was in physical condition to work (he had some physical ailments).

The Court of Appeals was good with all that. At least the *Roberson* decision allowed the poor guy to come back if the facts didn't meet the rosy prediction of the court.

We also include here ***In re Durrani***, which is a much more compassionate approach. It applies Brunner but takes things like credit damage and psychological damage (of having a large, unpayable student loan balance) into account.

Matter of Roberson, 999 F. 2d 1132 - Court of Appeals, 7th Circuit 1993

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999 F.2d 1132 (1993)

In the Matter of Jerry L. ROBERSON, Debtor.
Appeal of ILLINOIS STUDENT ASSISTANCE COMMISSION.

No. 92-2103.

United States Court of Appeals, Seventh Circuit.

Argued January 27, 1993.

Decided July 20, 1993.

1133*1133 Roland W. Burris, Mark E. Wilson (argued), Office of Atty. Gen., Civ. Appeals Div., Chicago, IL, for Illinois Student Assistance Com'n.

David F. Black (argued), UAW-Chrysler Legal Services Plan, Belvidere, IL, for Jerry L. Roberson.

Before CUMMINGS and KANNE, Circuit Judges, and MIHM, Chief District Judge.[*]

KANNE, Circuit Judge.

In 1976, the debtor, Jerry Roberson, graduated from high school and enlisted in the United States Army. After serving for three years as a power generator/equipment repairman and operator, he opted for a career change. Upon receiving his honorable discharge in 1979, Mr. Roberson enrolled in Kishwaukee Community College, from which he received an associate of science degree in industry and technology in 1982. In the fall of 1983, Mr. Roberson enrolled at Northern Illinois University and, in the spring of 1986, earned a bachelor of science degree in industrial technology. Mr. Roberson financed his education at Kishwaukee and at Northern Illinois with $9,702 in student loans that were guaranteed by the Illinois Student Assistance Commission.

While attending Northern Illinois, Mr. Roberson began working as an automobile assembler at Chrysler Corporation in 1984. His employment at Chrysler continued after his graduation, apparently because his wages as an assembler exceeded those of any job 1134*1134 that his degree in industrial technology would enable him to immediately obtain. He earned approximately $33,000 at Chrysler in 1988, and another $30,000 in 1989.

Mr. Roberson's life began to fall apart in 1990. In January, he received his second conviction for driving under the influence of alcohol, resulting in the loss of his driver's license. He was laid off at Chrysler in February; in April his marriage was judicially dissolved. The divorce judgment ordered him to pay $121.60 a week in child support and awarded possession of the marital residence and automobile to his former wife. Without steady employment, Mr. Roberson's income plummeted to only $6,000 for that year, leaving him unable to pay his creditors.

On September 28, 1990, he filed his voluntary petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330. At the time of filing, he had an estimated $680 in total monthly expenses and no monthly income. Mr. Roberson reportedly possessed approximately $18,357 in assets and over $34,000 in debts.

In connection with his bankruptcy proceedings, Mr. Roberson filed a complaint against the Student Assistance Commission on April 9, 1990, requesting discharge of the unpaid balance on his student loans. While government guaranteed student loans generally may not be discharged in bankruptcy, 11 U.S.C. § 523(a)(8)(B) permits the discharge of such loans when failure to do so would "impose undue hardship on the debtor and the debtor's dependents."[1] After conducting a hearing on the issue, the bankruptcy court determined that the failure to discharge the student loans would not inflict "undue hardship" on Mr. Roberson. Consequently, the bankruptcy court declined to discharge the student loans, but did order a two-year deferment in the payment of such loans to allow Mr. Roberson to financially recover. Upon Mr. Roberson's appeal, the district court reversed the bankruptcy court's decision and discharged the student loans. 138 B.R. 885 The Commission filed a timely notice of appeal, presenting us with the issue of whether Mr. Roberson's circumstances warrant discharge of his student loans under the undue hardship exception of § 523(a)(8)(B).

Before addressing how the failure to discharge the student loans would affect Mr. Roberson, we must ascertain the meaning of "undue hardship" under § 523(a)(8)(B). Such an inquiry constitutes a question of law subject to *de novo* review. *See* *Matter of Newman,* 903 F.2d 1150, 1152 (7th Cir.1990). The Bankruptcy Code does not define "undue hardship," and, although numerous lower courts have applied § 523(a)(8)(B), little appellate court precedent interpreting the term exists. In addressing the undue hardship exception, both the bankruptcy court and the district court applied the three-pronged test articulated in *In re Johnson,* 5 Bankr.Ct.Dec. 532 (Bankr.E.D.Pa.1979):

> (1) Mechanical Test: The court must ask: Will the debtor's future financial resources for the longest foreseeable period of time allowed for the repayment of the loan be sufficient to support the debtor and his dependent[s] at a subsistence or poverty standard of living, as well as to fund repayment of the student loan?
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> * * * * * *
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> (2) Good Faith Test: Here, the court asks two questions:
>
> 1135*1135 (a) Was the debtor negligent or irresponsible in his efforts to minimize expenses, maximize resources or secure employment?
>
> (b) If "yes," then would lack of such negligence or irresponsibility have altered the answer to the mechanical test?
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> * * * * * *
>
> (3) ... Policy Test: The court must ask: Do the circumstances — *i.e.,* the amount and percentage of the total indebtedness of the student loan and the employment prospects of the petitioner indicate:
>
> (a) That the dominant purpose of the bankruptcy petition was to discharge the student debt, or
>
> (b) That the debtor has definitely benefitted financially from the education which the loan helped to finance?
>
> *Id.* at 544.[2]

We decline the lower courts' and Mr. Roberson's invitation to adopt the *Johnson* test, and instead, for the reasons discussed below, adopt the undue hardship test set forth by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395 (2d Cir.1987) (per curiam).

> "[U]ndue hardship" requir[es] a three-part showing (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] 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.
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> *Id.* at 396.

The first prong of *Brunner* requires an examination of the debtor's current financial condition to see if payment of the loans would cause his standard of living to fall below that minimally necessary. Bankruptcy courts have routinely applied this requirement as the bare minimum to assert a claim of "undue hardship" warranting discharge of student loans. *See, e.g.,* *In re Ipsen,* 149 B.R. 583, 585-86 (Bankr.W.D.Mo.1992). Student loans "should not as a matter of policy be dischargeable before [the debtor] has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." Comm'n on the Bankruptcy Laws of the United States, Report, H.R.Doc. No. 137, 93d Cong., 1st Sess., Pt. II, at 140 n. 15 (1973). In light of the heightened standard for dischargeability of student loans, an examination into the debtor's ability to maintain a minimal standard of living comports with common sense. *Brunner,* 831 F.2d at 396. This test should serve as the starting point for the § 523(a)(8)(B) inquiry since information regarding the debtor's current financial situation generally will be concrete and readily obtainable; only if the debtor meets this test should a court examine the other two *Brunner* requirements.

The second prong of the *Brunner* test properly recognizes the potential continuing benefit of an education, and imputes to the meaning of "undue hardship" a requirement that the debtor show his dire financial condition is likely to exist for a significant portion of the repayment period. As the proponents of a higher standard for dischargeability recognized:

> [E]ducational loans are different from most loans. They are made without business 1136*1136 considerations, without security, without cosigners, and rely[] for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 133 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6094. Accordingly, "the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *In re Briscoe,* 16 B.R. 128, 131 (Bankr.S.D.N.Y. 1981). Upon graduation, the student borrower's outstanding student loans often will dwarf his assets. Even though in the long run a government financed education may generate substantial returns, if steady employment is not immediately forthcoming bankruptcy provides an attractive means by which the student may eliminate frustrating and burdensome student loan payments. "Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is `undue.'" *Brunner,* 831 F.2d at 396.

Upon the debtor's satisfaction of the first two requirements for discharge, the court should examine the third prong of the *Brunner* test — whether the debtor has made a good faith effort to repay his loans. While our nation is hailed as the land of opportunity, few would dispute that higher education provides a vehicle to travel many of the roads to financial prosperity. In recognition of the role education plays in the pursuit of the value of equal opportunity, Congress made student loans available to those who otherwise may not have been able to receive adequate financing of a college education from private lenders. With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses. *See Johnson,* 5 Bankr.Ct.Dec. at 540-42. Furthermore, undue hardship encompasses a notion that the debtor may not willfully or negligently cause his own default, but rather his condition must result from "factors beyond his reasonable control." Comm'n on the Bankruptcy Laws of the United States, Report, *supra,* Pt. II, at 140 n. 16. *See also* Briscoe, 16 B.R. at 130-31 (good faith inquiry includes "whether the debtor was negligent or irresponsible in conducting his financial affairs such that the debtor's misfortune is self-imposed"); *Perkins v. Vermont Student Assistance Corp.,* 11 B.R. 160, 161 (Bankr. D.Vt.1980) (buying a new car was a "self [-]imposed hardship"); *In re Conner,* 89 B.R. 744, 749 (Bankr.N.D.Ill.1988) (finding that debtor imposed hardship upon herself by choosing to send her children to expensive schools).

Although in a different format, the *Johnson* test addresses the same three requirements as *Brunner,* but proceeds to implement an additional "policy test." Because the *Brunner* requirements effectively weed out those bankruptcy petitions primarily aimed at avoiding repayment of student loans (the first inquiry under the *Johnson* policy test), we see no need for the application of a separate policy test. More importantly, the second prong of the *Johnson* policy test improperly considers whether the debtor "has definitely benefitted financially from the education which the loan helped to finance." 5 Bankr.Ct.Dec. at 544. Such an inquiry conflicts with the basic concept of government-backed student loans.

As the lower court in *Brunner* stated, "[c]onsideration of the "value" of the education in making a decision to discharge turns the government into an insurer of educational value." 46 B.R. 752, 756 n. 3 (S.D.N.Y.1985). Congress' decision to increase the availability of higher education through student loans does not necessarily equate to a decision to insure the future success of each student taking advantage of that opportunity. The government guarantees repayment of the loan to the private lender so that those who, because of their current wealth and future earning potential would not be eligible to receive any financing or only financing at a higher rate of interest, may nonetheless receive an education.

1137*1137 The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow. Hence, we find *Johnson's* policy test inappropriate and decline to apply it.

Having adopted the Second Circuit's test for undue hardship, we turn to the inquiry of whether Mr. Roberson's circumstances meet that test, a question of law subject to *de novo* review. *Brunner,* 831 F.2d at 396. In doing so, we accept the bankruptcy court's findings of fact, with the exception of those that are clearly erroneous, *Newman,* 903 F.2d at 1152, and place the burden on Mr. Roberson to establish that his circumstances warrant discharge of his loans. *In re Webb,* 132 B.R. 199, 201 (Bankr.M.D.Fla.1991); *In re Ealy,* 78 B.R. 897, 898 (Bankr.C.D.Ill. 1987).

With regard to Mr. Roberson's financial condition, at the time of the hearing he had no income and an estimated $680 per month in expenses, including $40 a week to rent a one room apartment with no kitchen or toilet. In addition, the $34,395 in debts listed in his bankruptcy petition overwhelms his $18,357 in assets, $11,250 of which represents an illiquid interest in the house that his former wife possesses. Hence, both parties agree that his financial condition at the time of the petition prevented Mr. Roberson from maintaining a minimal standard of living and making payments on the student loans.

Addressing the second requirement for discharge, the parties dispute whether the bankruptcy court's factual findings lead to the conclusion that Mr. Roberson's financial condition is only temporary or will extend over a large portion of the repayment period. In particular, the parties refer to the following excerpt from the bankruptcy court's opinion:

The Debtor's Petition and testimony at trial, on its face, indicate a fair earning history and potential. The Debtor's past income has been substantial. The Debtor's present and near-term income, however, appears speculative at best.

We accept the Commission's view that the bankruptcy court factually found that Mr. Roberson's financial straits were not likely to continue for an extended period of time. Unquestionably, the short-term outlook is dismal: "[T]he Debtor was unemployed at the time of the trial with slight prospects for employment in the near future with his lack of transportation and [his wrist and back injuries]." However, the bankruptcy court found that these impediments would not prohibit gainful employment in the future, noting that Mr. Roberson will be eligible for a new driver's license in 1993 and finding that his medical condition does not appear "insurmountable." More importantly, the bankruptcy court's decision to allow the debtor a "two-year deferment to enable him to get back on his feet" supports the view that the debtor's hardship will not continue over an extended period.

While any precise prediction of his future earnings and expenses is necessarily speculative, Mr. Roberson has not indicated his road to recovery is obstructed by the type of barrier that would lead us to believe he will lack the ability to repay for several years. *See, e.g.,* *In re Norman,* 25 B.R. 545, 550 (Bankr.S.D.Cal.1982)(psychiatric problems prevent work); *In re Siebert,* 10 B.R. 704, 705 (Bankr.S.D.Ohio 1981) (lack of usable job skills and severely limited education); *In re Clay,* 12 B.R. 251, 254 (Bankr.N.D.Iowa 1981) (required to fully support dependents). Rather, the bankruptcy court found that "he will be able to use the skills he learned with the loan proceeds, and that he simply needs to get through some tough times." Consequently, while the bankruptcy court presented a bleak forecast for the near future, its factual findings lead us to conclude that the debtor's dire straits are only temporary, and thus he has failed to demonstrate "undue hardship" as required for the discharge of his student loans under § 523(a)(8)(B).

Much of Mr. Roberson's inability to find and hold employment relates to the transportation problems caused by his two drunk 1138*1138 driving convictions. At oral argument, the parties focused on whether or not these convictions preclude a finding that Mr. Roberson exercised a good faith effort to repay his student loans, the final requirement for discharge. Having found that Mr. Roberson's temporary hardship precludes discharge, we leave this question for another day.

While drunk driving can cause one to veer off the path to prosperity into a ditch of destitution, Mr. Roberson fortunately has managed to avoid an irreparable harm that all too often is inflicted by this behavior — death or disability. Instead, he finds himself in financial straits, which the bankruptcy court concluded could be remedied by a two-year deferment of his student loans. If, upon the expiration of that deferment on December 11, 1993, Mr. Roberson's financial condition has not improved as anticipated, he may file a motion requesting the bankruptcy court reopen his case pursuant to Fed. R.Bankr.P. 4007(a) and (b).

The district court's decision discharging Mr. Roberson's student loans is REVERSED, and the case is REMANDED for the entry of judgment consistent with this opinion.

[*] The Honorable Michael M. Mihm, Chief Judge of the United States District Court for the Central District of Illinois, is sitting by designation.

[1] Section 523(a)(8) prohibits the discharge of an individual debtor from any debt:

for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless —

(A) such loan, benefit, scholarship, or stipend overpayment first became due more than 7 years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

Mr. Roberson does not appeal the bankruptcy court's holding that his loans are not dischargeable under § 523(a)(8)(A), which at the time the bankruptcy court heard the case permitted the discharge of student loans that became due more than five years before the petition's filing, rather than the seven-year period contained in the current version.

[2] The bankruptcy court did not expressly state that it was applying the *Johnson* test, but in effect applied these same three requirements for discharge. The bankruptcy court held that although he possessed "a fair earning history and potential," Mr. Roberson met the mechanical test for discharge, considering his expenses far exceeded his present or near-term income, and had also satisfied the good faith test. However, the bankruptcy court concluded that Mr. Roberson failed the second part of the policy test because, in the future, he will be able to use some of the skills acquired through his education and because his lack of a driver's license, which was hampering his current employment efforts, was "an arguably self-inflicted result" of his convictions for driving under the influence of alcohol.

On appeal, the district court held that the bankruptcy court erred by applying the policy test after it had found that Mr. Roberson satisfied the mechanical and good faith tests for discharge. Noting the bankruptcy court considered the driving under the influence prosecutions only under the policy test, the district court held that these convictions did not preclude a finding that Mr. Roberson met the good faith test.

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In re Durrani, 311 BR 496 - Bankr. Court, ND Illinois 2004

311 B.R. 496 (2004)

In re Bettie J. DURRANI, Debtor.
Bettie J. Durrani, Plaintiff,
v.
Educational Credit Management Corp., assignee for Citibank, USA, Defendant.

Bankruptcy No. 97 B 16918. Adversary No. 02 A 1859.

United States Bankruptcy Court, N.D. Illinois, Eastern Division.

June 30, 2004.

498*498 Bettie J. Durrani, Chicago, IL, Pro Se.

Mark E. Shure, Kelly J. Mc Clintic, Keating & Shure, Ltd., Chicago, IL, for Defendant.

MEMORANDUM OPINION

PAMELA S. HOLLIS, Bankruptcy Judge.

This matter comes before the court on the motion of Bettie J. Durrani for reconsideration of the order entering judgment in favor of Educational Credit Management Corp. on February 3, 2004. The parties each filed several memoranda in support of their positions. Having read the papers submitted and reconsidered the issues, the court grants the motion, vacates its February 3 order and finds that excepting Durrani's student loan debt from discharge would impose an undue hardship on her.

BACKGROUND

The court held a trial on the complaint on September 12, 2003, and issued its order and judgment on February 3, 2004 (the "February 3 Order"). In the February 3 Order, the court found the outstanding sum due from Durrani to ECMC to be $58,881.19. The court further concluded that so long as Durrani was eligible to participate in the U.S. Department of Education's William D. Ford Direct Loan Program's Income Contingent Repayment Plan with a monthly payment of approximately $331.00, she could maintain a minimal standard of living while repaying the debt. The court further ordered that:

If the William D. Ford Direct Loan Program's Income Contingent Repayment Plan is unavailable to Plaintiff, or if the monthly payment under the plan is substantially more than $331, this judgment is subject to reopening to reconsider whether it would be an undue hardship for Plaintiff to pay any portion of the remaining student loan balance.

Order at ¶ 4.

According to this motion for reconsideration and the extensive briefing from both parties that followed, Durrani's monthly payment under the ICRP would be approximately $395.00. Furthermore, the actual amount of the payment cannot be confirmed until Durrani signs a new promissory note. Finally, Durrani represents in her papers that she has been told she is ineligible for the ICRP unless the February 3 Order is vacated. Although ECMC 499*499 argues that Durrani can participate if ECMC releases the judgment previously entered by this court, it is not necessary to resolve that issue given the court's ruling today.

Based on the testimony at trial, the court made findings of fact, [1] which are not reconsidered here, except for certain inferences drawn from those findings.

FINDINGS OF FACT

1. Durrani attended Chicago State University from 1984 to 1993. She received a Bachelor of Arts degree in 1989 in Independent Studies and a Master of Science Degree in Corrections and Criminal Justice in 1993.

2. Between 1984 and 1990, Durrani took out twelve loans in amounts varying from $408.00 to $5,758.00, to finance the cost of her education. The total amount of these original loans was $24,682.00.

3. In March 1994, Durrani applied to consolidate those student loans. At that time, the balance due was $31,170.09. When the consolidation was approved, the total balance financed was $31,869.14. The repayment schedule required 48 payments of $239.02, starting on June 8, 1994, and 192 payments of $313.75, starting on June 8, 1998.

4. Durrani has been employed at Chicago State since May 16, 1989. Her current position is as an Academic Advisor at an annual salary of $36,312.00.

5. On April 30, 2003, the president of Chicago State wrote an open letter to the university community. She concluded that layoffs were necessary due to budget restrictions. Durrani's position was actually eliminated, but due to her seniority she obtained a transfer effective June 1, 2003. Durrani also testified that because of budget problems she has not received a raise in the past two years and does not expect one in the foreseeable future.

6. Durrani is approximately 51 years old and is eligible for retirement in November 2007. At the time she retires, Durrani will be eligible for a monthly retirement benefit from Chicago State in the amount of $1,020.00.

7. Durrani suffers from diabetes, high blood pressure, high cholesterol, poor vision and osteoarthritis in one knee. She has a permanent handicapped parking placard from the Illinois Secretary of State.

8. Durrani has consistently tithed to her congregation for over 20 years. In 2001, she tithed $1,706 and made additional offerings of $42. In 2002, she tithed $1,967 and made additional offerings of $37. Through May 18, 2003, she had tithed $1,105 and made additional offerings of $23.

9. Durrani requested and was granted two loan forbearances between September 1994 and September 1996.

10. Prior to filing her bankruptcy petition, Durrani made at least nine payments on the consolidated loan, four before the forbearances and five from the time the forbearances ended until she filed her petition.

11. Durrani filed for relief under Chapter 13 on June 2, 1997 and confirmed her plan on July 29, 1997. During the bankruptcy case, the Chapter 13 Trustee distributed $3,940.51 to ECMC's predecessor. This amount was 10% of the filed claim, pursuant 500*500 to the plan. Interest continued to run on the unpaid portion of the loan. As of November 22, 2002, the principal balance was $39,651.17 and the accumulated interest was $15,007.32.

12. Durrani made all of the required payments under her plan and received her discharge on September 12, 2002. At the conclusion of the bankruptcy case, all of the interest that had accumulated during the case was capitalized into the principal, bringing the loan balance to $54,558.27. Durrani filed this complaint to discharge that loan under § 523(a)(8) on December 5, 2002, shortly after she completed her Chapter 13 payments.

13. Although there was testimony at the trial regarding her daughter's income, Durrani's post-trial surreply indicates that her daughter is now married.

14. Durrani's net monthly income is $2,241.00. She testified that Chicago State requires a $116 deduction for her retirement. Although her expenses have varied a small amount during the time this complaint has been pending, as of November 14, 2003, her monthly expenses were:

Tithe	$ 226.00

Rent	$ 505.00
Electricity	$ 45.00
Cooking Gas	$ 30.00
House Phone	$ 65.00
Credit Cards	$ 175.00
Laundry	$ 55.00
Groceries	$ 300.00
Medical	$ 100.00
Cable	$ 52.00
Auto Insurance	$ 70.00
Car Note	$ 100.00
Car Maintenance	$ 95.00
Renter's Insurance	$ 22.00
Cell Phone	$ 40.00
Gasoline	$ 90.00

Household Supplies	$ 85.00
Recreation	$ 20.00
TOTAL	$2,075.00
SURPLUS	$ 166.00

15. After post-trial questioning by the court, Durrani stated that the credit card expense was to pay for current necessities, and not to pay down old debt.

16. The William D. Ford Program, administered by the U.S. Department of Education, provides an Income Contingent Repayment Plan. Under this plan, a borrower's monthly repayment amount is based on income, and that monthly payment is capped at 20% of the borrower's income above the poverty line. Any amount that remains after 25 years of participation in the ICRP is discharged. Amy Schreiner, a paralegal for the ECMC, testified at trial that the purpose of the William D. Ford Program was to allow student loan borrowers a "fresh start."

17. At the time of the trial, evidence was submitted that Durrani's payment under the ICRP would be $331.33, and would drop to $54.33 after her retirement.

18. Durrani testified that she often called whichever entity was currently holding her loan to discuss the status of her loan and payments she had made or would be making.

19. The parties agree that since Durrani's household size has been reduced from two to one, her estimated payment under the ICRP would be between $390.00 and $395.00.

CONCLUSIONS OF LAW

A. The *Brunner* Test is the Standard for Determining Whether Excepting a Student Loan From Discharge Would Impose an Undue Hardship on the Debtor, and Has Been Adopted by the Seventh Circuit.

When considering a request for relief under 11 U.S.C. § 523(a)(8), this court 501*501 is bound by *Matter of Roberson,* 999 F.2d 1132 (7th Cir.1993), which adopted the *Brunner* test used by several circuits. *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395 (2nd Cir.1987) (per curiam). The three questions set forth in *Brunner* frame the issue of whether excepting a student loan debt from discharge will impose an undue hardship on the debtor. Accordingly, the issues that must be resolved in the instant proceeding are:

1. Whether, based on current income and expenses, Durrani can maintain a "minimal" standard of living for herself if forced to repay the loan;

2. Whether additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the loan; and

3. Whether Durrani has made good faith efforts to repay the loan.

Durrani has the burden of proving each element of the *Brunner* test by a preponderance of the evidence. Although the *Brunner* test uses objective standards, the decision is still ultimately at the discretion of this Court to use its "intuitive" sense of what is a "minimal" standard of living and what is "good faith." *See* 4 *Collier on Bankruptcy,* ¶ 523.14[2] (15th ed. rev'd 2003).

Although many courts still adhere to a restrictive interpretation of *Brunner,* other recent decisions have been less formulaic. For example, a recent BAP decision from the 9th Circuit reversed a bankruptcy court that had denied dischargeability after finding a lack of "exceptional circumstances" under *Brunner's* second prong. *Nys v. ECMC,* 308 B.R. 436 (9th Cir. BAP 2004). Instead, the BAP instructed the lower court to reconsider the second prong of the test:

The circumstances need be "exceptional" only in the sense that they demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay. The court may consider any number of circumstances that relate to future ability to pay. Depending on the case, the debtor's age, training, physical and mental health, education, assets, ability to obtain a higher paying job or reduce expenses, and other factors not listed here may be relevant. The test is, by its nature, case-by-case.

Id. at 444.

Similarly, the Tenth Circuit recently handed down a decision affirming the discharge of a debtor's student loans. It was an opportunity for the Circuit to provide guidance to its lower courts on the undue hardship standard, since it had not yet designated a test. Although the panel adopted *Brunner,* it did so with a focus on the overriding goal of the Bankruptcy Code that honest but unfortunate debtors be provided with a fresh start:

Many subsequent courts employing the *Brunner* analysis ... appear to have constrained the three *Brunner* requirements to deny discharge under even the most dire circumstances....

These applications show that an overly restrictive interpretation of the*Brunner* test fails to further the Bankruptcy Code's goal of providing a "fresh start" for the honest but unfortunate debtor, and can cause harsh results for individuals seeking to discharge their student loans.

ECMC v. Polleys, 356 F.3d 1302, 1308 (10th Cir.2004) (citations omitted). Consequently, the *Polleys* panel cautioned that *Brunner* "must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged." *Id.* at 1309.

502*502 This court is bound by the Seventh Circuit's interpretation of *Brunner* as set forth in *Roberson* and reinforced in *In re O'Hearn,* 339 F.3d 559 (7th Cir.2003). In O'Hearn, the bankruptcy court's decision to grant a hardship discharge was vacated by the court of appeals and remanded for development of the record consistent with the appellate court's comments. In its opinion, the appellate court raised several issues that are not present in this case. The debtor O'Hearn testified he did not have any health problems that impaired his ability to work. The opposite is present here. Durrani suffers from diabetes and other disabilities sufficient enough to qualify for a permanent handicapped parking placard from the Illinois Secretary of State. O'Hearn also paid $1,402 per month to his fiancee to live in her house although he received no equity interest. The bankruptcy court found that he could rent a two bedroom in the area for less than $1000 per month. The ECMC also argued that O'Hearn pursued a course of building an equity interest in his fiancee's home in lieu of honestly attempting to pay down his educational debts. Again the circumstances are quite different here as Durrani's living arrangements are modest; she pays $505 a month to rent and owns no real estate or contributes to anyone else's purchase of real estate as occurred in O'Hearn. Finally, O'Hearn was able to come up with a lump sum payment offer of $30,000 to ECMC, comprised of savings and family contributions. After ECMC rejected this offer because over $50,000 was owed, O'Hearn stopped making any payments. In contrast, Durrani has no savings or significant assets of any kind to make such an offer, yet she has continued to attempt payments when able. Even following the "path that gave ample recognition to the term 'undue'," 339 F.3d at 564, this court finds that Durrani has satisfied the*Brunner* factors.

B. The Second Prong—Whether Additional Circumstances Exist Indicating That This State of Affairs is Likely to Persist for a Significant Portion of the Repayment Period.

Additional circumstances exist such that Durrani's present situation is likely to persist for a significant portion of the repayment period of her student loan. Durrani is approximately 51 years old and is eligible for retirement in November 2007 from the only employer she has had since completing her education. *See, e.g., O'Hearn,* 339 F.3d at 566 n. 6 noting that "the court properly considered Mr. O'Hearn's age [50] in forecasting his future prospects". Durrani submitted evidence demonstrating that her income will drop to $1,020 per month upon retirement. She suffers from diabetes, high blood pressure, high cholesterol, poor vision and osteoarthritis in one knee. Although her testimony regarding her physical condition was credible on its own, it is bolstered by the fact that she has a permanent handicapped parking placard from the Illinois Secretary of State. Furthermore, Durrani submitted evidence that she has no reasonable expectation of a raise in the near future; in fact, her position was recently eliminated due to budget constraints and she was only able to transfer to a new position at Chicago State because of her seniority. She has maximized her career potential; there is no concern that Durrani trying to shed this student loan on the eve of a lucrative career. There was no testimony to indicate that Durrani could have found a better-paying position but forsook a higher salary for the noble purpose of serving in academia. For all of these reasons, additional circumstances exist beyond a mere current inability to pay.

503*503 **C. The Third Prong—Whether Durrani Has Made Good Faith Efforts to Repay the Debt.**

Durrani has made good faith efforts to repay this loan. She made at least nine payments on the consolidated loan between 1994 and 1997, when she filed for bankruptcy protection. During the pendency of her Chapter 13 case, ECMC's predecessor received 15 payments on the loan, totaling 10% of the amount of its proof of claim. After seeking relief under Chapter 13 in 1997, Durrani actually completed her plan and received a discharge of her other debts. The fact that she completed her plan is strongly indicative of Durrani's good faith and her commitment to repay her debts. According to one source, only about "one-third of chapter 13 debtors complete their repayment plans." Ed Flynn, Gordon Bermant and Karen Bakewell, "A Tale of Two Chapters: Financial Data," 21 AM. BANKR. INST. J. 20 (October 2002).

Furthermore, Durrani submitted evidence that she engaged in extensive communications with each entity holding her student loans. Durrani has not attempted to evade these creditors; instead, the evidence shows that she has been forthright and assertive in dealing with this obligation.

The facts in *Brunner,* the seminal "undue hardship" case, provide a clear example of a debtor who has not made a good faith effort to repay her loans. Marie Brunner sought a discharge of her student loan debts "within a month of the date the first payment of her loans came due. Moreover, she did so without first requesting a deferment of payment...". 831 F.2d at 397. At the time of the hearing in bankruptcy court, only ten months had passed since Brunner had graduated from her master's program.

The facts in this case could not be more different. Durrani incurred this debt over a period that ended 12 years before she filed her § 523(a)(8) complaint. She consolidated the loans in 1994, and received two forbearances between 1994 and 1996. In addition to the payments she made before filing, Durrani paid 10% of the loan amount through her Chapter 13 plan. Durrani has easily satisfied the third prong of the *Brunner* test.

D. The First Prong—Whether, Based on Current Income and Expenses, Durrani Can Maintain a "Minimal" Standard of Living For Herself If Forced to Repay the Debt.

The remaining question is whether, based on current income and expenses, Durrani can maintain a "minimal" standard of living for herself if forced to repay this loan. In the February 3 Order, the court concluded that Durrani did not satisfy this prong. The basis for this ruling was the finding that Durrani could afford the minimum payment of $331.00 under the ICRP. Since new allegations indicate that the ICRP payment will be nearly $400.00, the court will reconsider the inferences it drew and the conclusions it made under this prong.

1. Whether Durrani Must Stop Tithing to Reduce Her Expenses.

The first question is whether Durrani must eliminate her $226.00 monthly tithe. Pursuant to the Religious Liberty and Charitable Donation Protection Act of 1997, Congress determined that charitable contributions to a qualified religious organization up to 15 percent of the gross income of a debtor may not be included in the calculation of that debtor's disposable income. 11 U.S.C. § 1325(b)(2)(A).

At least two courts have held that since the RLCDPA made no changes to 504*504 § 523(a)(8), the Act does not automatically allow debtors to classify tithing as an allowable expense. *See* *ECMC v. McLeroy,* 250 B.R. 872, 880 (N.D.Tex.2000);*Ritchie v. Northwest Educ. Loan Ass'n,* 254 B.R. 913, 919-921 (Bankr.D.Idaho 2000).

Other courts, however, have rejected the strict reading of the RLCDPA found in*McLeroy* and *Ritchie. See* *Meling v. U.S. Dept. of Educ,* 263 B.R. 275, 279 (Bankr. N.D.Iowa 2001), *affd,* 2002 WL 32107248 (N.D.Iowa January 22, 2002); *Lebovits v. Chase Manhattan Bank,* 223 B.R. 265, 273 (Bankr.E.D.N.Y.1998). At least one Illinois bankruptcy court concluded that the disposable income standard in § 1325(b)(2) should be used for the "minimal living standard" analysis under § 523(a)(8). *See Robinson v. ISAC,* 2002 WL 32001246, *3 (Bankr.C.D.Ill. Oct.22, 2002).

In the written memorandum incorporated by reference into the February 3 Order, the court concluded that a bankruptcy judge should not override a debtor's commitment to tithing. Durrani was very credible in her testimony regarding her belief that the money she tithes does not belong to her and that she cannot make those funds available for her creditors. The court notes that while in her budget Durrani indicates that she tithes $226.00 per month, the records from her church do not completely support this contention. According to these contribution statements, her average monthly tithe was $142.17 in 2001 and $163.92 in 2002. In response to this court's question on the discrepancy, Durrani indicated that some contributions were made by dropping cash into the basket as it passes around at church or through other means that would not generate a receipt. The court will therefore not take into account the additional funds that could be available if she reduced her contributions in the future.

2. Whether Other Expenses Should be Reduced to Reflect a "Minimal" Standard of Living.

There are other expenses in Durrani's budget that the court previously questioned. However, upon reconsideration, it is a very close call as to whether Durrani could actually afford the $331.00 monthly payment under the ICRP. For example, the court previously took issue with the $175.00 monthly expense for "credit cards." In the February 3 Order, the court was concerned that the credit card companies were new creditors who were receiving payment while ECMC continued to wait.

Having reconsidered all of the facts before the court, however, the more appropriate inference to draw is that Durrani's budgeted expenses do not reflect the money she is actually spending to maintain a minimal standard of living. In other words, the $175 "credit cards" expense is akin to a line item for unexpected monthly expenses. Considering that Durrani suffers from numerous physical ailments, the $100 she budgets each month for "medical" may not be sufficient to cover her actual costs. The court also notes that there is no line item for "clothing." While a minimal standard of living would not include lavish shopping expeditions, it is unrealistic to expect that a person who works in a professional environment would spend nothing on clothing each year. Neither is there a line item for household repairs or furniture, beyond $85.00 per month for "household supplies."

Upon reconsideration, the $52.00 monthly expense for cable also is not inappropriate. "While the Debtors' budget may not be as spartan as it could be, the amount which could be further wrung out would not be sufficient to make the difference required here." *Buracker v. Student Loan Marketing Ass'n,* 2004 WL 950771, 505*505 at *3 (Bankr.CD.IU. May 3, 2004) ($86.00 monthly cable/Internet expense did not preclude finding that excepting a HEAL loan from discharge would be unconscionable, which is a harsher standard than "undue hardship").

Durrani's budgeted expenses reflect a "minimal" standard of living. Unlike the debtor in *O'Hearn,* 339 F.3d at 565-566, she does not live in a 2000 square foot, four bedroom house. Instead, Durrani's budget indicates that she lives modestly with a monthly rent payment of $505.00. The *O'Hearn* panel criticized the bankruptcy court for allowing the debtor to justify his high rent by ignoring the fact that "[m]any couples are forced to live in less appealing housing because of the financial obligations undertaken by one or the other." *Id.* at 565. Durrani's housing choice is already "less appealing." She indicated at oral argument that although she is unable to because of her credit history, she would like to move because her neighborhood is not safe. She also raised this concern in addressing the court's earlier observation that a cell phone is not a necessity: "Where Plaintiff lives, having a cell phone is a necessity. It's a safety issue." Plaintiff's Supplemental Reply Brief, at 6.

Therefore, upon reconsideration, the court determines that it erred in holding that based on her current income and expenses Durrani can maintain a minimal standard of living if forced to repay the loan under the ICRP.

3. The First Prong of Brunner Asks Whether the Debtor Can Maintain a "Minimal" Standard of Living if Forced to *Repay the Loan,* Not Whether She Has Any Surplus Income.

The question framed by *Brunner* in this first prong is whether Durrani can maintain a minimal standard of living if she is required *to repay this loan,* not whether she has any surplus in her budget available for a monthly payment. It is uncontroverted that Durrani has some money available each month because even without the court's inquiry into her expenses, Durrani's budget showed a modest surplus of $166.00.

The amount of this loan was $58,881.19 on February 3, 2004, and it has been accruing interest since that date. Assuming an 8.25% interest rate, which according to Exhibit A of ECMC's March 24, 2004, Supplemental Response In Opposition to Plaintiffs Motion to Reconsider, is the highest interest rate that can be charged under the consolidated loan, Durrani's loan is accruing interest at a per diem rate of $13.68. Supplemental Response at 3. In March, for example, $424.08 ($13.68 x 31) accrued in simple interest.

As a result, if Durrani made the minimum ICRP payment of $331, the loan would never be paid off but instead would continue to grow. Even under the $390— $395 monthly payment that triggered this motion for reconsideration, Durrani's payments would be insufficient to cover the interest. Once Durrani retires and her income drops to $1,020 per month, an event that is likely to happen relatively soon, her payment under the ICRP would also be reduced and even less interest would be paid each year. Consequently, even if Durrani could afford the ICRP payment—which the court has not found she can do—enrolling in the ICRP would result in negative amortization and the amount of this loan would continue to grow throughout the 25 year repayment term. Clearly Durrani cannot maintain a minimal standard of living and repay this loan.

506*506 **4. The ICRP is Only One Factor for a Court to Consider in Determining Whether Undue Hardship Exists.**

Furthermore, the availability of the ICRP cannot be a magic wand that when waved precludes discharge of a student loan debt. *See* *Cheney v. ECMC,* 280 B.R. 648, 665 (N.D.Iowa 2002) ("the William D. Ford Program is no silver bullet for student loan creditors to avoid discharge of student loan debts owing to undue hardship if the creditors ... demonstrate that a particular debtor did in fact know about and understand such alternatives for resolving student loan debts"); *Korhonen v. ECMC,*296 B.R. 492, 496 (Bankr.D.Minn. 2003).

This must especially be true where, as in this case, the debtor cannot realistically afford to make the payments required by the ICRP. *See, e.g.,* *Alderete v. ECMC,* 308 B.R. 495, 507 (10th Cir. BAP 2004) (determining that the bankruptcy court gave too much weight to the existence of the ICRP where "the evidence showed that even if eligible, the Debtors could not have made their Ford Program payments").

a. Courts Have Found Undue Hardship Even Where the ICRP Payment Would Be Zero.

There are numerous published cases where a debtor's monthly payment under the ICRP would be $0.00—obviously an amount that any debtor can pay while maintaining a minimal standard of living—yet the court found the existence of undue hardship and determined that the student loan was dischargeable. *See* *Cheney,* 280 B.R. 648 (under the 8th Circuit's "totality of the circumstances" test); *Fahrer v. Sallie Mae Servicing Corp.,* 308 B.R. 27 (Bankr.W.D.Mo.2004) ("totality of the circumstances" test); *Johnson v. ECMC,* 299 B.R. 676, 683 (Bankr.M.D.Ga.2003);*Cota v. U.S. Dept. of*

Educ, 298 B.R. 408, 421 n. 16 (Bankr.D.Ariz.2003) ("The logic of applying for a program that allows the debtor a $0 'payment' as a precondition to a finding of a debtor's good faith, is lost on the court."); *Korhonen,* 296 B.R. 492("totality of the circumstances" test); *Gregoryk v. US. Dept. of Educ,* 2001 WL 1891469 (Bankr.D.N.D. March 30, 2001) ("totality of the circumstances" test);*Herrmann v. U.S. Dept. of Educ,* 2000 WL 33961388 (Bankr.C.D.Ill. Feb.7, 2000);*Thomsen v. Dept. of Educ,* 234 B.R. 506, 512 (Bankr.D.Mont.1999) (even though monthly payment would be zero under the ICRP, the first *Brunner* prong "requires simply that the Debtors show they cannot repay the loans and maintain a minimal standard of living").

Instructive in this matter is the case of *Newman v. ECMC,* 304 B.R. 188 (Bankr.E.D.Pa.2002) (considering whether summary judgment was appropriate on § 523(a)(8) complaint). The *Newman* debtor's monthly payment under the ICRP would have been zero, and defendant ECMC therefore argued that the debtor's refusal to participate in the ICRP required a finding that she was not acting in good faith. In denying ECMC's motion for summary judgment, the *Newman* court stated:

[W]hile consideration of the debtor's repayment options is one factor that a court may consider in determining "undue hardship" under the totality of the circumstances, I am unaware of any decision which holds that the availability of the William D. Ford Federal Direct Loan Program to a debtor—including its "income contingent repayment plan" option—by itself requires a finding that it would not be an "undue hardship" to repay the student loan obligation.

304 B.R. at 195. The fact that a debtor can afford the monthly ICRP payment is 507*507not dispositive as to whether she can maintain a minima] standard of living while repaying her student loan.

b. The Existence of the ICRP Cannot Obliterate the Bankruptcy Code's "Fresh Start" Policy.

There were numerous reasons provided in the zero payment cases, as well as in other undue hardship cases, for considering the availability of the ICRP as merely one factor in the dischargeability decision. First, the bankruptcy process is fundamentally about providing "honest but unfortunate" debtors with a fresh start.*See* *Grogan v. Garner,* 498 U.S. 279, 286-287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The Supreme Court has observed that a

central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt,* 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934).

Grogan, 498 U.S. at 286, 111 S.Ct. 654.

See *Grawey v. Illinois Student Assistance Comm'n,* 2001 WL 34076376, at *6(Bankr.C.D.Ill. Oct.ll, 2001) ("Unlike the income contingent repayment plan, bankruptcy relief is designed to give the honest but unfortunate debtor a fresh start. And although government guaranteed student loans are meant to be more difficult to discharge than general unsecured debts, they are not meant to be impossible to discharge."); *Polleys,* 356 F.3d at 1309 ("to better advance the Bankruptcy Code's 'fresh start' policy ... the terms of the *[Brunner]* test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged"); *Alston v. U.S. Dept. of Educ,* 297 B.R. 410, 417 (Bankr.E.D.Pa.2003) (the argument that a debtor might be able to make some payments during the 25 year repayment period "loses sight of Congress' intent that bankruptcy relief provide the debtor with a fresh start"); *Korhonen,* 296 B.R. at 497 ("unlike the Income Contingent Repayment Plan, bankruptcy relief is designed to give the honest but unfortunate debtor a fresh start").

When Congress first determined that educational loans should be presumptively excepted from discharge, it was because it believed that many student borrowers were abusing the "fresh start" policy by filing for bankruptcy and obtaining discharge of educational debt soon after graduation, before making any significant attempts at repayment. Congress permitted the discharge of educational debt, however, if the bankruptcy petition was filed at least five years after the loans first became due. The enactment of the five year nondischargeability period thus reflected the congressional purpose of shielding the government guaranteed educational loan program from opportunities for abuse.

Hiatt v. Indiana State Student Assistance Comm'n, 36 F.3d 21, 24 (7th Cir.1994)(citations omitted), *cert. denied,* 513 U.S. 1154, 115 S.Ct. 1109, 130 L.Ed.2d 1074 (1995).

The five year nondischargeability period was statutorily extended to seven years, and has now been entirely eliminated. But the "fresh start" policy is still integral to the bankruptcy process, and cannot be ignored. Durrani took out her first student loan in 1984. If she is forced to participate in the ICRP, she will not be free of this student loan debt until 2029. Despite the testimony of an ECMC witness that the purpose of the ICRP is to allow student loan borrowers a fresh start, binding Durrani to her debt until 2029 508*508 would give no weight whatsoever to the notion that at some point, honest but unfortunate debtors are entitled to a fresh start.

c. The Discharge of a Student Loan After the 25 Year ICRP Term is a Taxable Event.

The court must also take into account the considerable tax burden that will be borne by Durrani if she does participate in the ICRP for the full 25 year term. The ICRP provides that any portion of the debt that is not paid will be discharged at the end of 25 years. However, that discharge of indebtedness, unlike a discharge in bankruptcy, results in income that Durrani would have to recognize for taxable purposes. As several cases have noted, the result is that she would still face a nondischargeable debt after the repayment period has run:

That conclusion [that the debtors satisfied the second *Brunner* prong] is not changed, as Defendant urges, because Debtors' loans would be discharged after 25 years. In that event the unpaid amount, together with the interest which will have accrued in 25 years, would be discharged by the Defendant and treated as taxable income. In other words, the Debtors would simply exchange one huge nondischargeable debt for educational loans for another in the form of nondischargeable income taxes. See 11 U.S.C. § 523(a)(1). Under these circumstances of clear and undue hardship, this Court deems the better result is to discharge the Debtors' educational loan debt, which they have no prospect of ever repaying, now and give the Debtors the benefit of a fresh start.

Thomsen, 234 B.R. at 514. *See also* *Grawey,* 2001 WL 34076376, at *6; *Gregoryk,*2001 WL 1891469, at *3. *Compare* *Archibald v. United Student Aid Funds, Inc.,* 280 B.R. 222, 229-230 (Bankr.S.D.Ind. 2002) (giving little weight to the tax implications of the ICRP where debtor "will likely obtain employment more in line with her educational qualifications, making the income tax treatment of a fully or near fully paid off loan negligible").

d. There Are Emotional Aspects to the Denial of Dischargeability That May Be Considered.

The psychological and emotional toll on a debtor that results from adding 25 years to the life of a student loan should not be overlooked. This is especially true where, as here, the debtor first incurred the debt between 14 and 20 years ago. *See, e.g.,Fahrer,* 308 B.R. at 36 (acknowledging that "[i]n a different context, the Court might give more weight to the availability of the ICRP and a debtor's refusal to apply for participation in that program," but under the circumstances, the substantial emotional toll on the debtor would only be "compounded and exacerbated if the Debtor remains responsible for $180,000 in student loan debt, a sum which will increase with accruing interest and which ultimately may not be resolved for a quarter of a century"); *Herrmann,* 2000 WL 33961388, at *4 (discharging student loans where debtor who "will never have the income to make payments on her student loans ... should not have to have these student loans hanging over her head for another 25 years ..."). Although Durrani will never be able to pay off this loan, she will be burdened by a huge and growing obligation that remains on her credit record, and arguably, according to Durrani, condemns her to remaining in a neighborhood that is becoming increasingly unsafe, because the loan obligation blocks her ability to rent from another landlord who would perform a credit check.

509*509 **e. If a Debtor Who Is Eligible To Participate in the ICRP Could Never Show Undue Hardship, the Effect is the Impermissible Substitution of an Administrative Formula for a Bankruptcy Judge's Discretion.**

Finally, the decision whether to allow debtors to discharge a student loan is committed to the discretion of the bankruptcy judge, using the three part test set forth originally in *Brunner.* Courts must not turn to the ICRP as a substitute for the thoughtful and considered exercise of that discretion. To do so would be to abandon all decision-making responsibility and convert a § 523(a)(8) adversary into a rote and meaningless exercise.

If Congress had intended the question of dischargeability of student loans to be delegated to a nonjudicial entity, no matter how fair its formulas and intentions may appear, it could have provided for such. As attractive as it may be to postpone the decision and to rely on the long-term supervision afforded by the ICRP and the apparent fairness of its continuing review of a debtor's income as compared to the established poverty standard, the Court will discharge its duty as provided in the Code and make a present determination of dischargeability.

Johnson, 299 B.R. at 682. *See In re Nys,* 2003 WL 22888941, at *1 (Bankr.N.D.Cal. Aug. 11, 2003) ("Testimony in this and other cases has convinced the court that some officials of the Ford Program are compassionless number-crunchers and that determinations as to how much a debtor can afford to pay are much better left to the courts."), *reversed and remanded,* 308 B.R. 436 (9th Cir. BAP 2004) (to reconsider finding of nondischargeability); *Herrmann,* 2000 WL 33961388, at *3 ("The Department of Education may not usurp the judicial function of determining undue hardships by promulgating regulations governing the repayment of student loans.").

For all of these reasons, the court finds that based on current income and expenses, Durrani cannot maintain a "minimal" standard of living for herself if she is forced to repay this debt.

CONCLUSION

The court previously found that Durrani satisfied the second and third *Brunner* prongs, and has set forth its reasoning more fully in this opinion. Upon reconsideration, the court now finds that Durrani has satisfied the first *Brunner* prong as well.

Therefore, Durrani has met her burden of showing that excepting the debt to ECMC from discharge would impose an undue hardship upon her, pursuant to 11 U.S.C. § 523(a)(8). The motion for reconsideration is granted, and Durrani's debt to ECMC is discharged.

[1] The court made an oral ruling on February 3, 2004, and distributed a written memorandum in support of that ruling. That written memorandum was attached to the February 3 Order as Exhibit A and incorporated therein.

Eighth Circuit Law

The Eighth Circuit has, in our opinion, adopted the fairest and most accurate system for applying the "undue hardship" test in student loan bankruptcy. It applies what it calls the "totality of the circumstances" test, a test which does just what it purports to do. Like the other circuits, the Eighth circuit tries to make sure that the borrower is in real financial hardship that is likely to last for a significant time, and that the borrower is not trying to scam the system.

The advantage of the Eighth circuit test, however, is that no one factor is determinative in a vacuum, and it does not seek to weight subjective factors disproportionately. The Brunner test requires first an analysis of current financial reality, then the mythical search for "additional" factors, and the even more mythical concept of "good faith," which seems more than anything to be an expression of whether the judges feel sympathy for you. The Eighth circuit's test is more straightforward and honest – and in practice has seemed to be more lenient. We will look at two cases: In re Walker and In re Long.

Walker was, if anything, a travesty going the other way, for a change. We actually find this every bit as outrageous as cases going the other way, because they demonstrate how arbitrary the analysis and law can be – and because they favor the rich, of course. Nevertheless, on the strength of Walker, anyone with a student loan debt should consider moving into the Eighth Circuit: Minnesota, North Dakota, Missouri, Arkansas, and South Dakota.

Here are the facts: Walker was a woman who at the relevant time, had about $300,000 of student loan debt. She was a stay-at-home mom (with five children, two of whom had autism and required a great bit of care). Her husband was a police officer and security guard with an income of between $65,000 and $70,000 per year. The happy couple had recently purchased a $40,000 Chevy Suburban(!) to go along with their other two fairly late-model minivans and a four-door car they were lending to the husband's mother. They had also recently taken out a second mortgage on their home for $50,000 (no mention of the home's market value) to build a **screened-in porch**. *In other words, this family was living a wealthy lifestyle.*

There were large gaps in the record, and it was clear, that among other things, deductions for deferred income, pension, and various benefits were being double-counted(!). Somewhat bizarrely, the government lawyer stipulated to a certain amount of budget – exceeding $5,000 per month. Perhaps there was collusion, or there was at least gross incompetence. And perhaps the government simply did not believe it could lose. After all, most of these cases involve the courts screwing poor people. **In this case, however, the debtors were not poor, and they walked away scot-free from a debt of approximately $300,000.** A travesty, perhaps explained by the incompetence of the government lawyer – the Eighth Circuit declined to make a rule regarding decks, Suburbans, or incomplete records, needless to say. But this is a case you will certainly want to cite, repeatedly.

In re Long is a horse of a somewhat different color, but the actual impact of the Eighth Circuit decision is unclear. In that decision, the court simple reinforced its adoption of the "totality of circumstances" test and mentioned that it believed it was a fairer and more consistent way to apply the law. We believe that is true, *Walker* notwithstanding. The court in Long sent the decision back to the district court to look at again in light of certain specific standards of review. The court could have ruled that such a "remand" (handing back to the district court) was unnecessary in view of the clear facts, but perhaps it did not do so for internal, political reasons. We do not know what happened with the case in the final analysis.

In re Walker, 650 F. 3d 1227 - Court of Appeals, 8th Circuit 2011

650 F.3d 1227 (2011)

In re Michele D. WALKER, Debtor.
Michele D. Walker, Plaintiff/Appellee,
v.
Sallie Mae Servicing Corp.; SLM Education Credit Finance Corporation; Kohn Law Firm, S.C.; Zwicker & Associates, P.C.; Sallie Mae, Defendants,
Educational Credit Management Corporation, Defendant/Appellant.

No. 10-2032.

United States Court of Appeals, Eighth Circuit.

Submitted: December 15, 2010.
Filed: August 18, 2011.

1229*1229 A.L. Brown, Educational Credit Mannagement Corp., Maplewood, MN, argued, for appellant.

Joseph Allen Skokan, Stillwater, MN, argued, for appellee.

Before WOLLMAN, MURPHY, and COLLOTON, Circuit Judges.

WOLLMAN, Circuit Judge.

The Educational Credit Management Corporation (ECMC) appeals from the judgment of the bankruptcy court, later affirmed by the Bankruptcy Appellate Panel (BAP), which discharged the student loan debt of Michele D. Walker (Walker) under the "undue hardship" provision of 11 U.S.C. § 523(a)(8). We affirm.

I.

We summarize the relevant facts as outlined in *Walker v. Education Credit Management Corp.,* 427 B.R. 471 (8th Cir. B.A.P.2010). Walker accumulated student loan debt to fund her undergraduate education at the University of Illinois, from which she graduated in 1989. She completed a medical school preparatory program at Creighton University and then enrolled in the University of Illinois College of Medicine. After her second year of medical school, Walker failed her initial state licensing exam and was dismissed. When her appeals for reentry were denied, Walker worked as a pharmacy technician and substitute teacher. She met Troy Walker, a police officer, and married him in 1996. She entered a master's program at Governor State University in 1997, graduating with a degree in school psychology in 2000. She funded this part of her education with private loans that are not implicated in her discharge petition.

The Walkers have five children — the oldest born in 1998, one set of twin boys born in 2000, and a second set of twins born in 2001. In 2002, the Walkers moved from Chicago, Illinois, to Minneapolis, Minnesota, where Walker began a full-time post-graduate internship as a school psychologist with the Minneapolis Public Schools, earning between $16,000 and $17,000 annually. Walker worked for the school district for another year, but was unable to continue because her position was cut. After her internship ended, Walker cared for her children, devoting much of her time to the older set of twins, who had been diagnosed with autism in 2003.

In 2004, the Walkers moved from Minneapolis to Hudson, Wisconsin, where they remain. Troy retained his position with the Minneapolis police department and moonlighted as a security officer during his off hours. Walker has not worked outside of the home since 2004. She filed a Chapter 7 bankruptcy petition in April 2004 and received her discharge three months later. That discharge had no effect on her student loan debt because she did not seek an undue hardship determination until 2007, when she initiated this proceeding. By that time, her five children were attending Wisconsin public schools, including the autistic twins, who have been mainstreamed.

In 2008, the autistic twins were accepted into the Wisconsin Early Autism Project, a state-funded program of intensive, in-home therapy for children with autism that entailed eight to nineteen hours during the week, plus eight hours each Saturday and Sunday. A parent must be present for the therapy sessions, and Walker fulfilled that1230*1230 obligation. In addition, she spent about two hours per day preparing for the session and remained available to respond to calls from the school if either of the autistic twins had a "meltdown" at school. Setting aside time to care for the twins or to respond to calls from their school made it difficult for Walker to keep a regular schedule that would permit her to work outside the home, even on a part-time basis. Additionally, because the older twins are eligible for full participation in the state-funded autism program for only a three-year period, Walker anticipates that their total session time will be reduced to ten to twenty hours per month at some point in 2011.

From 2004 to 2007, the Walkers' combined adjusted gross income, derived exclusively from Troy's employment, ranged from $59,019 to $67,639. In 2007, Walker enrolled in an associate's degree program to become a registered nurse, with the aim of earning supplemental income. She left the program after one semester, however, because she could not care for her children and attend school at the same time. The Walkers incurred two sizeable debts during this period that are relevant to our analysis below. In 2005, they took out a $50,000 home equity loan, $30,000 of which went to build a screened-in deck on their home in Wisconsin, with a monthly payment of $373.52. In 2007, Troy purchased a new Chevrolet Suburban for $40,000, with a monthly payment of $850. At that time, the family owned a 1998 minivan, a 2004 minivan, and a 1998 sedan that had been loaned to Walker's mother.

In 2007, Walker filed an adversary proceeding seeking to discharge roughly $300,000 in student loan debt under the undue hardship provision of § 523(a)(8) of the Bankruptcy Code. The parties agree that Walker is eligible for enrollment in the Ford Program's Income Contingent Repayment Plan (ICRP), set forth in 34 C.F.R. § 685.209. They also agree that based on a household adjusted income of $67,639 and a family of seven, Walker would have a monthly payment of $593.98 under the ICRP.

II.

We review *de novo* whether excepting a debtor's student loan debt from discharge constitutes an undue hardship. *Long v. Educ. Credit Mgmt. Corp. (In re Long),* 322 F.3d 549, 553 (8th Cir.2003). We review for clear error the subsidiary findings of fact on which this legal conclusion is based. *Reynolds v. Pa. Higher*

Educ. Assistance Agency, 425 F.3d 526, 531 (8th Cir.2005). We will not upset those findings of fact unless, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been made. *Cumberworth v. U.S. Dept. of Educ. (In re Cumberworth),* 347 B.R. 652, 657 (8th Cir.BAP2006).

Section 523(a)(8) of the Bankruptcy Code provides that debts from educational loans "made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit," may not be discharged unless "excepting such debt from discharge... will impose an undue hardship on the debtor and the debtor's dependents." The debtor has the burden of establishing undue hardship by a preponderance of the evidence. To assess whether the debtor has met this burden we apply a totality-of-circumstances test, under which we consider (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the reasonable living expenses of the debtor and her dependents; and (3) any other relevant facts and circumstances surrounding the particular bankruptcy case. *In re Long,* 322 F.3d at 554.

1231*1231 ECMC raises three claims on appeal. First, it contends that the bankruptcy court erred in considering Walker's financial circumstances at the time this § 523(a)(8) proceeding commenced in 2008. In its view, the undue hardship analysis must be made on the evidence as it stood at the time of initial Chapter 7 discharge in 2004. Second, it claims that Walker failed to prove undue hardship by a preponderance of the evidence and that the bankruptcy court overcame gaps in the record by making impermissible inferences about Walker's financial resources and expenses. Third, it claims that the bankruptcy court erred in finding that Walker's household expenses were "modest and commensurate" with a minimal standard of living. It contends that the Walkers' expenses are unreasonable as a matter of law so as to preclude an undue hardship determination.

A. Temporal Scope of Undue Hardship Analysis

ECMC maintains that the bankruptcy court committed clear error in looking beyond 2004 when calculating Walker's expenses and income. It contends that "the factual question is whether there is an undue hardship at the time of discharge, not whether there is an undue hardship at the time that a § 523(a)(8) proceeding is commenced." *Bender v. Educ. Credit Mgmt. Corp.,* 368 F.3d 846, 848 (8th Cir. 2004). But this precept arose from, and is to be applied in, a factual context much different than that which exists here.

Bender involved a Chapter 13 debtor who sought an undue hardship determination before she completed her Chapter 13 plan. At issue was whether the debtor's § 523(a)(8) petition was ripe for adjudication when filed three and a half years before discharge could occur. We observed that the prospective evaluation of a Chapter 13 debtor's future capacity to repay student loan debt would "require some degree of judicial prescience," the exercise of which was both impractical and unnecessary. *Id.* We reasoned that "such proceedings should take place relatively close to [the discharge] date so that the court can make its determination in light of the debtor's actual circumstances at the relevant time," held that the petition was not ripe, and affirmed its dismissal. *Id.*

The operative rule in *Bender* has no application here. Neither the bankruptcy court nor the BAP was speculating about Walker's prospective financial condition; both courts were assessing her financial activity from the preceding four years. The risks associated with the exercise of "judicial prescience" are thus absent here. It would make little sense to require that the court ignore what actually occurred after

Walker's Chapter 7 discharge in order to comply with a rule that was crafted to assure that a court "can make its determination in light of the debtor's actual circumstances at the relevant time," i.e., the time of the undue hardship determination. *Id.* Indeed, to ask the court to ignore what occurred in Walker's life after 2004 would be inconsistent with the first prong of the totality-of-circumstances test, which instructs a fact-finding court to consider "the debtor's past, present, and reasonably reliable future circumstances." *In re Long,* 322 F.3d at 554.

ECMC's invocation of *In re Woodcock,* 326 B.R. 441 (B.A.P. 8th Cir.2005) lends no support to its argument. *Woodcock* involved a Chapter 7 debtor who sought reconsideration of an order denying a discharge on the basis of undue hardship. As the BAP noted, the debtor sought relief via a Rule 60(b) motion on the grounds that the passage of time showed that his circumstances had not improved, which purportedly indicated that the bankruptcy 1232*1232 court erred in denying discharge. *Id.*at 447. The holding — that the judgment of nondischargeability was a final judgment not subject to collateral attack based on a claim that debtor's circumstances had failed to improve — does not support ECMC's argument for a limited temporal scope of undue hardship review. Accordingly, we hold that it was not clear error to consider Walker's financial condition from 2004 through 2007 in the undue hardship analysis.

B. Net Income Calculations

ECMC complains that Walker produced no evidence related to Troy Walker's part-time income, leaving an unspecified amount of income unaccounted for. It also maintains that the bankruptcy court committed clear error when it applied 2007 income tax and payroll deductions to adjusted gross income figures from 2004 to 2007. Finally, ECMC contends that the bankruptcy court exacerbated this error by subtracting certain tax liabilities from the stipulated adjusted gross income figure, which amounted to a double-counting of deductions and artificially reduced the net income calculation. ECMC asserts that this method of calculating net income taints the overall analysis because it is based on mere speculation and relieves Walker of her burden of proving undue hardship by a preponderance of the evidence.

We ground our review on income figures to which both parties stipulated. Because ECMC stipulated to these figures, we reject its claim that it was clear error not to calculate and include income from Troy Walker's part-time work. The parties stipulated that the Walkers' adjusted gross income in 2007 was $67,639.[1] This leaves a monthly adjusted gross income of $5,636.58. The BAP found no error in the bankruptcy court's method of using the Walkers' actual federal and state tax liability for 2007, rather than taking the sum of income tax withholdings from Troy's paychecks and then accounting for the Walkers' income tax refund. When averaged over twelve months, the monthly income tax obligation was $372. We agree that this was not error and thus adopt this figure for our analysis. We question, however, the manner in which both the bankruptcy court and the BAP treated additional voluntary withholdings from Troy's 2007 paystubs.

The paystubs indicate automatic payroll deductions in the amount of $934.10 for items such as retirement, deferred compensation, medical insurance, life insurance, and pension. These paystubs were admitted into the record without explanation from Walker and were not challenged by ECMC at trial. Both the bankruptcy court and the BAP added the sum of the payroll deductions to the tax liability to reach a total withholding of $1,306.10 and subtracted this sum from their respective gross monthly income calculations to arrive at a net monthly income. At no point did either court acknowledge that it had subtracted the income tax liability and payroll deductions from the 2007 *adjusted* gross income figure to which both parties stipulated. In other words, both courts treated as monthly gross income a figure the parties stipulated to be monthly *adjusted* gross income. This conflation is problematic because the adjusted gross income figure may account for at least some of the payroll deductions on the paystub, e.g., retirement, deferred compensation, and employee contribution to a medical 1233*1233 insurance premium. *See* 26 U.S.C. § 62(a) (defining adjusted gross income as gross income minus the sum of the above-the-line deductions, including retirement savings and health-saving accounts).

Because we have a stipulated gross adjusted income figure, not the tax return itself, we cannot compare the 2007 tax return with the payroll stub to discern which, if any, deductions on the payroll stub were also claimed as above-the-line deductions. On this record, it is impossible to discern whether double-counting did in fact take place. ECMC is of little help, because it failed to challenge the paystub evidence at trial, failed to address the issue of double-counting when it appeared before the BAP, and failed to specify on appeal which specific payroll deductions it believed may have been double-counted.

We recognize that "a court may not engage in speculation when determining net income and reasonable and necessary living expenses." *Educ. Credit Mgmt. Corp. v. Jesperson (In re Jesperson),* 571 F.3d 775, 780 (8th Cir.2009). In *Jesperson,* the bankruptcy court credited testimony from the debtor regarding his federal income tax obligation that was patently false, which had the effect of understating the debtor's income. The bankruptcy court also concluded that the debtor's housing expenses were $1000 per month, when the evidence showed that the debtor lived rent-free with his brother and had worked out an agreement under which he could continue to do so for $500 per month. We concluded that the bankruptcy court had clearly erred in both determinations and thus reversed the undue hardship determination. Similarly, in *In re Rose,* 324 B.R. 709 (8th Cir.BAP2005), the BAP concluded that the bankruptcy court committed clear error by ignoring more than $260 in monthly disposable income and by giving undue weight to the mere possibility that debtor might need a new car or the possibility that her roommate might move out, thereby doubling her housing costs. *Id.* at 713. These possibilities did not rise to the level of "reasonably reliable facts and circumstances" and could not serve as the basis of the bankruptcy court's legal conclusion. *Id.*

The degree of speculation evident in *Jesperson* and *Rose* is absent here. The BAP did not substitute assumptions or speculation for reasonably reliable facts, nor did it accept an income figure that was patently false or give undue weight to changes in the debtor's life circumstances that had not yet occurred. Rather, it employed a method that posed a risk of double-counting in determining the debtor's net monthly income. We reject ECMC's suggestion that employing this method is akin to impermissible speculation and we likewise reject the claim that it so taints the undue hardship analysis that it precludes discharge as a matter of law. Net income is but one factor in the analysis and is to be assessed relative to reasonable household expenses. Accordingly, the magnitude of the potential error can be evaluated only in the larger context of the totality-of-circumstances analysis.

If we exclude altogether the disputed payroll deductions of which ECMC complains, we subtract the monthly federal and state income tax liability of $372 from the stipulated monthly gross adjusted income of $5,636.58 to arrive at a net monthly income of $5,264.58.[2] That figure is still less than the Walkers' monthly expenses1234*1234 of $5,913, leaving a monthly deficit of nearly $650. Thus, even when the payroll deductions are excluded, the expenses of the debtor and her dependents outstrip her available resources. ECMC responds that this deficit is illusory because the claimed expenses of Walker and her dependents are unreasonable as a matter of law.

C. Household Expenses

A debtor's household income must be used to satisfy reasonable and necessary expenses. *In re Jesperson,* 571 F.3d at 779. "To be reasonable and necessary, a debt must be `modest and commensurate with the debtor's resources.'" *Id.* at 780 (quoting *In re DeBrower,* 387 B.R. 587, 590 (Bankr.N.D.Iowa (2008))). "[I]f the debtor's reasonable financial resources will sufficiently cover payment of the student loan debt — while still allowing for a minimal standard of living — then the debt should not be discharged." *In re Jesperson,* 571 F.3d at 779.

ECMC challenges as unreasonable the monthly car payment of $850 on the 2007 Chevrolet Suburban SUV and the monthly payment of $373.52 on the $48,000 second mortgage, of which, as set forth earlier, $30,000 was used to build the deck porch. ECMC points out that the monthly payment on the Suburban alone exceeds the monthly payment of $593.98 that Walker would pay on her student loan debt under the ICRP and questions the need to purchase a new vehicle when the family owned two other mini-vans and had loaned its sedan to Walker's mother.

Both the bankruptcy court and the BAP were troubled by the cost of these two items, as are we. Yet we also recognize that the porch and the Suburban fulfill important functions in the daily life of this family of seven. Moreover, because "fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy," *In re Long,* 322 F.3d at 554,we consider these expenses in light of the overall financial and interpersonal context of Walker's household.

As outlined above, even if we exclude all the payroll deductions when calculating net income, the Walkers run a deficit of nearly $650 per month. Aside from challenging specific expenses as unreasonable, ECMC did not rebut the findings of fact on which this calculation is based, nor did it identify a scenario under which Walker could realistically increase the household's income. Even if the family had chosen a more modest vehicle or had not added a deck to the home, it is unrealistic to expect that Walker could meet her minimum ICRP payment of $593.98 in light of the monthly household deficit in excess of that amount.

Though we may question the wisdom of the particular purchases at issue, we also recognize that "the minimal standard of living" for Walker must account for the size of her family and the special needs of her two autistic children. On the basis of the record before us, we agree with the BAP's conclusion that "the reality of the Walkers' budget is that Michele cannot afford to make any payments on her student loans and still maintain a minimal standard of living. That circumstance, based on the evidence offered, is likely to continue for many years...." *In re Walker,* 427 B.R. at 487.

This is not a case in which a debtor willfully chose to avoid payments that could have been made or was underemployed or unemployed for no discernible reason. Caring for her five young children has become Walker's full-time occupation. Both the bankruptcy court and the BAP determined that it was unlikely 1235*1235 that Walker would be able to work until the older twins reached the age of majority, if at all, and noted that the staleness of her education at that time would limit her employment options.

We agree that, in light of the overall circumstances of this case, excepting Walker's student loan debt from discharge would impose an undue hardship on her.

The judgment is affirmed.

COLLOTON, Circuit Judge, concurring in the judgment.

The apparent contradictions in this case are troubling. Michele Walker could satisfy her student loan debt of $283,354.50 by making monthly payments of $593.98 under the Department of Education's Income Contingent Repayment Plan ("ICRP"). *See* *Educ. Credit Mgmt. Corp. v. Jesperson (In re Jesperson),* 571 F.3d 775, 782 (8th Cir.2009). At the same time, she and her family are making monthly payments of $850 on her husband's purchase of a new 2007 Chevrolet Suburban with leather seats and a DVD player, at a cost of approximately $40,000. *See* *Walker v. Sallie Mae Servicing Corp. (In re Walker),* 406 B.R. 840, 857 & n. 33 (Bankr.D.Minn. 2009). The Walkers also make monthly payments of $224.11 for that portion of a $50,000 second mortgage loan that they used to build a sixteen-by-twenty-two-foot screened deck onto their house. *See id.* at 857; R. Doc. 27, at 4. In total, the Walkers are paying $1074.11 monthly for the SUV and deck addition. Without those expenses, the same amount of funds would allow Walker to meet her student loan obligation under the ICRP, with $480.13 per month to spare. Yet the court concludes that even if the Walkers "had chosen a more modest vehicle or had not added a deck to the home, it is unrealistic to expect that Walker could meet her minimum ICRP payment of $593.98 in light of the monthly household deficit in excess of that amount." *Ante,* at 1234. How can that be?

Educational Credit Management Corporation cries foul, but ECMC's own stipulations and forfeited objections in the bankruptcy court are the source of its problem. Although it seems that the Walkers must be getting money from somewhere to pay $1074.11 per month for a new vehicle and a second mortgage, ECMC stipulated that the family's total adjusted gross income was $5636.58 per month in 2007, R. Doc. 27, at 4, and raised no objection to any other expenses on the monthly budget submitted by the Walkers. 406 B.R. at 856 & n. 31; *see* App. 101. Thus, even correcting for the errors of the bankruptcy court and the Bankruptcy Appellate Panel in conflating adjusted gross income and gross income, *ante,* at 1232-33, and giving the benefit of the doubt to ECMC that the BAP may have double-counted payroll deductions, *ante,* at 1232-33, the stipulations and unchallenged numbers *still* result in a calculation that supports the discharge. If the SUV and mortgage payments attributable to the deck are excluded entirely, the Walkers have left-over income of $425.69 per month, which falls short of the minimum ICRP payment of $593.98. Without the help of the ICRP (which would permit cancellation of debt amounting to $105,160.50 plus interest after twenty-five years, *see* 34 C.F.R. § 685.208(k)(1), § 685.209(c)(4)(i)), it is hard to see how Walker ever could repay the student loans, and why the "fresh start" permitted by discharge should not apply. *Cf.* *Jesperson,*571 F.3d at 782.

The Bankruptcy Appellate Panel declined to decide whether the bankruptcy court erred in concluding that the purchase of the SUV and the deck addition were reasonable and necessary expenses, *see* 427 B.R. at 487, and this court reserves1236*1236 judgment on that question as well. *Ante,* at 1234-35. In view of the income and expenses figures for 2007 that were established by ECMC's litigating positions in the bankruptcy court, and properly considered by the court, *see ante,* at 1228-32, I concur in the judgment.

[1] The BAP appears to have transposed a number in its calculation when it concluded that the parties had stipulated to a 2007 adjusted gross income of $67,939. The record reflects that the actual stipulation reads "$67,639." A-134, at ¶ 6.

[2] By ignoring the paystub withholdings entirely, we assume that each voluntary deduction on the paystub had already been accounted for in the gross adjusted income figure. If anything, this approach favors ECMC and attributes to the Walkers a higher net monthly income than might otherwise be justified.

In re Long, 322 F. 3d 549 - Court of Appeals, 8th Circuit 2003

322 F.3d 549 (2003)

In re: Nanci Anne LONG Debtor.
Nanci Anne Long, Appellee,
v.
Educational Credit Management Corporation, Appellant.

No. 02-1426.

United States Court of Appeals, Eighth Circuit.

Submitted: October 11, 2002.

Filed: March 11, 2003.

550*550 551*551 Daniel S. Fisher, argued, St. Paul, MN, for appellant.

Matthew Drewes, argued, Oakdale, MN, for appellee.

Before McMILLIAN, BOWMAN, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Educational Credit Management Corporation ("ECMC") appeals the Bankruptcy Appellate Panel's ("BAP") decision affirming the Bankruptcy Court's discharge of Nanci Long's student loan debt. This case requires us to address the undue hardship provision found in 11 U.S.C. § 523(a)(8)(B). ECMC argues that the Bankruptcy Court erred in its determination that repayment of the debt would impose an "undue hardship" on appellee. ECMC also contends that the BAP relied on an incorrect review standard to reach its decision. We reverse and remand.

I.

Background

Appellee, Nanci Long, is a thirty-nine-year old, single-mother. Appellee matriculated through Northwestern College of Chiropractic. She financed her education there, in part, through substantial student loans, which are the subject of this case. In 1987 she passed her state-board examination. Until 1990 she worked as a chiropractor in various clinics. Appellee owned and operated a successful chiropractic practice from 1990 until 1993. At some point in 1993, appellee began to experience extreme fatigue, depression, and diminution of her mental faculties. These symptoms increasingly affected her work, causing a substantial drop in her clientele. In 1995, appellee terminated her chiropractic practice altogether, citing an inability to handle life changes. She continued in a downward economic and emotional spiral.[1] At one point, she attempted suicide. Fortunately, in 1997, appellee obtained appropriate professional help and has begun a recovery process. She is now gainfully employed and is pursuing an additional college degree.

According to appellee, her symptoms currently include "severe, short-term memory loss," persistent ache, dramatic weight gain, and anxiety about being in public places. In order to treat her condition, appellee takes various prescription drugs[2] and sleeps in excess of twelve hours per day.[3] The Bankruptcy Court found that appellee's medical condition will persist into the future and will interfere with her future earning potential.

Appellee currently works (as a laboratory manager at a community college) nine months of the year, for approximately thirty-two hours per week. She is paid $12.59 per hour and earns approximately $1,163 per month. Appellee's monthly wage covers all of her existing expenses. She currently resides in her parents' home and pays them $500 to $600 per month. This 552*552 amount — in addition to the subsidies her parents provide — covers her and her ten-year old child's rent, utilities, car payment, car insurance, health insurance, cellular phone bill, child care, and food. Appellee's additional monthly expenses include approximately $50 for personal expenses, $100 for entertainment and dining-out, and $100 to $275 for gasoline. She also pays $80 per month towards her child's private-school tuition. Lastly, appellee covers her tuition costs — related to her pursuit of a four-year degree — which vary depending on the particular course, credits, and college.[4]

The debt in question originated shortly after appellee's graduation from chiropractic college with the disbursement of a $35,322.81 consolidated student loan.[5] Appellee made approximately ten years' of payments towards this debt, but defaulted after she became ill. She filed her bankruptcy petition in 2000.[6] With principal, interest, and collection costs, appellee now owes ECMC over $61,000. Additionally, appellee still owes $15,000 of a separate, non-dischargeable Health Education Assistance Loan ("HEAL loan").

In its collection efforts, ECMC urged appellee to consider the Income Contingent Repayment Plan ("ICRP"),[7] which the Department of Education[8] administers. Under the ICRP, the Department of Education will cancel any balance the appellee owed on her total student loan obligation — HEAL or ECMC — after twenty-five years of repayment has occurred. *See* 34 C.F.R. § 685.209(c)(4)(iv) ("If a borrower has not repaid a loan in full at the end of the 25-year repayment period under the income contingent repayment plan, the Secretary cancels the unpaid portion of the loan.") Appellee acknowledged familiarity with the ICRP. However, she did not apply because she believed that she could not "handle things" and because her circumstances continued to be overwhelming.

After its hearing, the Bankruptcy Court granted appellee an undue hardship discharge. It reasoned that requiring appellee's ECMC loan repayment would essentially impose a "sentence of [twenty-five] years in payments on an obligation that she could never realistically expect to retire or reduce." The Bankruptcy Court concluded that the severity and "historical intensity" of appellee's illness and "overall prognosis" would prevent appellee from earning enough money to "dig herself out of these... loans." Conversely, the Bankruptcy Court also noted that "there is some good reason to believe that [appellee] will ultimately get herself substantially out of this unfortunate situation and circumstance." It also optimistically stated that "there is good reason to believe that [appellee's] medical situation will improve."

After conducting a review for "clear error," a divided BAP summarily affirmed the Bankruptcy Court's decision. On appeal, ECMC argues that the BAP should have used the de novo standard in its review of the Bankruptcy Court's "undue 553*553hardship" determination. ECMC also contends that appellee's student loans were not dischargeable under § 523(a)(8)(B), because the loans did not impose an undue hardship.

II.

Standard of Review

This Court has not previously specified the appropriate "undue hardship" review standard for Eighth Circuit reviewing courts. Perhaps for this reason, the Eighth Circuit BAP has applied a clearly erroneous review standard. *See* *Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen*), 232 B.R. 127 (8th Cir. B.A.P. 1999). ECMC argues that the Eighth Circuit BAP should not have applied the clearly erroneous standard and should have applied a de novo standard of review. All other circuit courts, who have addressed this issue, have concluded that an "undue hardship" determination is a question of law, which requires a de novo review. *In re Brightful,* 267 F.3d 324, 327 (3d Cir.2001); *In re Rifino,* 245 F.3d 1083, 1087 (9th Cir.2001); *Tennessee Student Assistance Comm'n v. Hornsby,* 144 F.3d 433, 436 (6th Cir.1998); *In re Woodcock,* 45 F.3d 363, 367 (10th Cir.1995); *In re Roberson,* 999 F.2d 1132, 1134 (7th Cir. 1993); *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2d Cir.1987).[9] Whether declining to discharge appellee's student loans would impose on her "undue hardship" under 11 U.S.C. § 523(a)(8)(B) is a question of law. It requires a conclusion regarding the legal effect of the Bankruptcy Court's findings as to her circumstances. Questions of law are reviewed de novo. *In re Papio Keno Club, Inc.,* 262 F.3d 725, 728 (8th Cir.2001). Therefore, we agree with our sister circuits. The conclusion that appellee's student loans impose an "undue hardship" is a legal question to be reviewed de novo.

III.

Undue Hardship Test

ECMC also urges this Court to adopt the three-part test articulated in *Brunner v. New York State Higher Educ. Serv. Corp*., in a determination of "undue hardship." 831 F.2d at 396. For the reasons set forth below, we decline to do so. Instead, we reaffirm the totality-of-the-circumstances test as set forth in *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews*), 661 F.2d 702, 704 (8th Cir.1981).

Section 523(a)(8)(B) provides that an educational loan is not dischargeable unless "excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." Congress excepted student loans 554*554 from discharge in order to close what it deemed a loophole in the student loan program. *See* Raymond L. Woodcock, *Burden of Proof, Undue Hardship, and Other Arguments for the Student Debtor Under 11 U.S.C. § 523(A)(8)(B),* J.C. & U.L. 377, 381-84 (1998);*see also* *Johnson v. Missouri Baptist Coll. (In re Johnson),* 218 B.R. 449, 451-54 (8th Cir. B.A.P. 1998). The policy of this provision was clear. Congress intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan obligation from doing so.

However, the clarity that is found in the legislative purpose and policy surrounding § 523(a)(8)(B) is decidedly absent in the meaning Congress ascribed to the term "undue hardship." The Bankruptcy Code does not define the phrase and courts have struggled with its meaning. A divergent body of appellate authority has attempted to unwrap the "undue hardship" enigma. *See Pennsylvania Higher Educ. Assistance Agency v. Faish* (*In re Faish*), 72 F.3d 298, 303-305 (3d Cir.1995); *Chessman v. Tennessee Student Assistance Corp.* (*In re Chessman*), 25 F.3d 356, 359 (6th Cir.1994); *In re Roberson,* 999 F.2d 1132, 1135 (7th Cir.1993); *Brunner v. New York State Higher Educ. Serv. Corp.,* 831 F.2d 395, 396 (2d Cir.1987); *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re Andrews*); 661 F.2d 702, 704 (8th Cir.1981); *United Student Aid Funds, Inc. v. Pena* (*In re Pena*), 207 B.R. 919, 922 (9th Cir. B.A.P. 1997)

Many bankruptcy courts, including several in the Eighth Circuit, have adopted the *Brunner* test. *See e.g., In re Rose,* 227 B.R. 518, 524 n. 7 (Bankr.W.D. Mo 1998)(citations omitted); *Zlotopolski v. Dressel* (*In re Dressel*), 212 B.R. 611, 615-616 (Bankr.E.D.Mo.1997); *Hawkins v. Buena Vista Coll.* (*In re Hawkins*), 187 B.R. 294, 297-298 (Bankr.N.D.Iowa 1995). To date, the Eighth Circuit has not. *Andrews,* 661 F.2d at 704. The *Brunner* test requires the debtor to make a three-part showing in order to prove undue hardship: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal standard" of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. *Brunner,* 831 F.2d at 396. However, under a *Brunner* analysis, if the bankruptcy court finds against the debtor on any of the three prongs of the test, the inquiry ends and the student loan is not dischargeable. *Id.*

We prefer a less restrictive approach to the "undue hardship" inquiry. *See Andrews,* 661 F.2d at 704. We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B). Therefore, we continue-as we first did in *Andrews* — to embrace a totality-of-the-circumstances approach to the "undue hardship" inquiry. We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.

In evaluating the totality-of-the-circumstances, our bankruptcy reviewing courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.; Andresen,* 232 B.R. at 132. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt - while still allowing for a minimal standard 555*555 of living-then the debt should not be discharged. Certainly, this determination will require a special consideration of the debtor's present employment and financial situation - including assets, expenses, and earnings - along with the prospect of future changes-positive or adverse-in the debtor's financial position. *Id.* at 141.

We take special note that some bankruptcy courts in our circuit have not acknowledged and followed the controlling *Andrews* standard in an "undue hardship" determination. We trust that this opinion will serve to clarify the applicable analysis in future cases.[10]

IV.

Conclusion

Given the level of confusion as to the applicable standard of review and the viability of *Andrews,* we remand this case to the BAP. On remand, the BAP shall consider the Bankruptcy Court's "undue hardship" determination applying a de novo standard of review.

[1] Appellee's chiropractic license lapsed in 1999.

[2] These medications include: Welbutrin, Serzone, Prozac, and Glucophase.

[3] On a typical day, appellee will awake at 6:00 a.m., return to bed for a one or two hour morning nap, arrive at work at 9:00 a.m., return home to nap between 3:30 p.m. and 6:00 p.m., and conclude her day at 8:30 p.m.

[4] Appellee takes courses at Metropolitan State University and Cambridge Community College. Her annual tuition costs range between $500 and $800.

[5] The debt owing to ECMC results from a guaranteed student loan originally made to appellee by Sallie Mae on December 11, 1987, that was subsequently consolidated and transferred to Great Lakes Higher Education Corporation and thereafter assigned to ECMC.

[6] At the time appellee filed her bankruptcy petition, the debt was owned by Great Lakes Higher Education Corporation. Shortly thereafter, the loan was assigned to ECMC.

[7] *See* 34 C.F.R. § 685.209.

[8] This plan is a part of the William D. Ford Direct Loan Consolidation Program. *See* 34 C.F.R. § 685.200, *et. seq.*

[9] Neither the First Circuit Court of Appeals, nor the Bankruptcy Appellate Panel for the First Circuit has published an opinion regarding the review standard for "undue hardship" determinations under 11 U.S.C. § 523(a)(8). However, in the related context of legally defining the term "governmental unit" under § 523(a)(8), the First Circuit concluded that "[a]ppellate courts review bankruptcy court findings of fact under the clearly erroneous standard, but subject legal conclusion[s] drawn by such courts to de novo review." *T I Fed. Credit Union v. DelBonis,* 72 F.3d 921, 928 (1st Cir. B.A.P.1995).

Although the Fourth Circuit Court of Appeals has not decided the standard of review for § 523(a)(8) hardship discharges, the district courts within the Fourth Circuit have unanimously reviewed such cases under the de novo standard. *See* *In re Ekenasi,* 271 B.R. 256, 261 (S.D.W.Va.2002); *In re Coulson,* 253 B.R. 174, 175-76 (W.D.N.C.2000); *In re Dillon,* 189 B.R. 382, 384 (W.D.Va. 1995); *In re Malloy,* 155 B.R. 940, 945 (E.D.Va.1993).

[10] We favorably note that in the instant case the Bankruptcy Court utilized the controlling totality-of-the-circumstances approach in its "undue hardship" determination.

Ninth Circuit Law

In re Pena, 155 F. 3d 1108 - Court of Appeals, 9th Circuit 1998

155 F.3d 1108 (1998)

In re Ernest J. PENA; Julie Pena, Debtors,

UNITED STUDENT AID FUNDS, INC., Appellant,

v.

Ernest J. PENA; Julie Pena, Appellees.

No. 97-16012.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 16, 1998.

Decided September 11, 1998.

1109*1109 Madeleine C. Wanslee, Phoenix, AZ, for appellant.

Ernest J. Pena and Julie Pena, Phoenix, AZ, pro se appellees.

1110*1110 Before: REINHARDT, NOONAN and THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

Debtor-Appellees Ernest and Julie Pena sought a bankruptcy court discharge of government insured student loans which were guaranteed by appellant United Student Aid Funds, Inc. (USA Funds). The Penas contended the loans were dischargeable in bankruptcy because payment of them would impose an undue hardship within the meaning of 11 U.S.C. § 523(a)(8)(B). The bankruptcy court agreed and discharged the loans. The BAP affirmed. USA Funds now appeals. We have jurisdiction pursuant to 28 U.S.C. § 158(d) and we affirm.

STANDARD OF REVIEW

"Because this court is in as good a position as the district court to review the findings of the bankruptcy court, it independently reviews the bankruptcy court's decision." Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir.1986). This court applies a clearly erroneous standard to the bankruptcy court's findings of fact and reviews conclusions of law de novo. In re Claremont Acquisition Corp., 113 F.3d 1029, 1031 (9th Cir.1997).

FACTS

Debtors and appellees Ernest J. Pena, Jr. and Julie Pena are husband and wife. On July 1, 1994, they filed a petition for relief under Chapter 7 of the Bankruptcy Code. Among the debts from which the Penas sought relief were federally guaranteed student loans incurred by Ernest to attend ITT Technical Institute (ITT) in Phoenix, Arizona. Ernest consolidated his loans under a single note for $9,399.60. The note bears an annual interest rate of 10%. The loans were guaranteed by appellant, United Student Aid

Funds, Inc. (USA Funds), a private, nonprofit guarantee agency under the Guaranteed Student Loan Program established by the Higher Education Act of 1965, Public Law No. 89-329, November 8, 1965, Title IV, 79 Stat. 1219 (20 U.S.C. §§ 1087-1087-4).

When Ernest completed his studies at ITT, he was awarded a credential as an "Associate of Specialized Technology." The credential was useless to him. It did not help him in his employment, and it was not accepted by other colleges for course work credit. Nevertheless, the Penas made several payments on the student loans. When Ernest became unemployed, they sought and obtained a 90-day deferral. At the end of that period, they were unable to resume payments and have made no payments since.

Julie suffers from a serious mental disability. Since the age of 13 she has experienced severe stabbing pains and occasionally hears voices. In 1992 she became psychotic and was hospitalized. She has not been able to hold a job longer than six months to a year. In or about August 1995, Julie received roughly $8,000 in a lump sum payment as an award of past-due disability benefits related to her mental condition. The Penas used the lump sum payment to buy a 1976 Oldsmobile Cutlass Supreme automobile and to pay other bills. The Penas said they needed to buy the Cutlass because their other car, a 1972 Buick, did not run well. At the time of trial, Julie was receiving $378 per month in disability payments.

When the Penas filed their bankruptcy petition, they listed net monthly income of $1,178.67 (entirely from Ernest's employment) and monthly expenses of $2,605. During discovery, the Penas' income had increased to $1,748.47 (Ernest's net wages had increased to $1,370.47 and Julie began receiving disability payments of $378.00), while their expenses had dropped to $1,803.78 and they anticipated a further drop to $1,570. By the time of trial, Ernest testified that his wages had increased an additional $1.57 per hour, and expenses, as anticipated, had decreased to approximately $1,570 per month.

The bankruptcy court granted a discharge of the student loans pursuant to the undue hardship provision in 11 U.S.C. § 523(a)(8)(B). The BAP affirmed in a published opinion. In re Pena, 207 B.R. 919 (9th Cir.BAP, 1997).

I

THE UNDUE HARDSHIP STANDARD

Government guaranteed student loans cannot be discharged in bankruptcy unless, (A) more than seven years has elapsed between the time the loan first became due and the 1111*1111 filing of the bankruptcy petition; or "(B) excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8) (emphasis added).[1]

The Penas do not contend that at the time they filed their bankruptcy petition more than seven years had elapsed since Ernest's student loans first became due. They contend that if Ernest's student loans are not discharged, they will be subjected to "undue hardship" within the meaning of 11 U.S.C. § 523(a)(8)(B). Neither Congress nor this court has defined the term "undue hardship" in section 523(a)(8)(B). However, "The existence of the adjective `undue' indicates that Congress viewed garden-variety hardship as insufficient excuse for a discharge of student loans...." In re Brunner, 46 B.R. 752, 753 (S.D.N.Y., 1985) (Aff'd by 831 F.2d 395 (2d Cir.1987)).

A. In re Brunner

Brunner established a three-part test for a bankruptcy discharge of a student loan. First, the debtor must establish "that she cannot maintain, based on current income and expenses, a `minimal' standard of living for herself and her dependents if forced to repay the loans." Brunner, 831 F.2d at 396. The court noted that this portion of the test "comports with common sense" and had already "been applied frequently as the minimum necessary to establish `undue hardship.'" Id. (citing In re Bryant, 72 B.R. 913, 915 (Bankr.E.D.Pa.1987)).

Second, the debtor must show "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." Brunner, 831 F.2d at 396. This second prong is intended to effect "the clear congressional intent exhibited in section 523(a)(8) to make the discharge of student loans more difficult than that of other nonexcepted debt." Id.

The third prong requires "that the debtor has made good faith efforts to repay the loans...." Brunner, 831 F.2d at 396. The "good-faith" requirement fulfills the purpose behind the adoption of section 523(a)(8). Brunner, 46 B.R. at 754-55. Section 523(a)(8) was a response to "a `rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of education loan debts.'" Id., (quoting the Report of the Commission on the Bankruptcy Laws of the United States, House Doc. No. 93-137, Pt. I, 93d Cong., 1st Sess. (1973) at 140 n. 14). This section was intended to "forestall students ... from abusing the bankruptcy system." Id.

The Brunner test has been adopted by the Third and Seventh Circuits. In re Faish, 72 F.3d 298, 306 (3d Cir.1995) cert. denied, 518 U.S. 1009, 116 S.Ct. 2532, 135 L.Ed.2d 1055 (1996); Matter of Roberson, 999 F.2d 1132 (7th Cir.1993). Although some confusion exists regarding the status of Brunner in the Sixth Circuit,[2] it has been applied by the bankruptcy and district courts in every other circuit.[3]

Notwithstanding this wide acceptance, the BAP in the present case preferred the test set forth in In re Cheesman, 25 F.3d 356 (6th Cir.1994). Pena, 207 B.R. at 922. The BAP stated, "The Cheesman standard ... is the 1112*1112 better test.... The Debtors should not be required to prove that `exceptional circumstances' exist precluding an improved financial status in the future." Id.

B. In re Cheesman

Although the Sixth Circuit in Cheesman apparently applied Brunner to support its conclusion that the debtor did not meet any standard for undue hardship, the Sixth Circuit did not adopt any particular test. Cheesman, 25 F.3d at 359. Nor did the Cheesman court engage in any analysis regarding the various undue hardship tests then in use. Cheesman, however, did use slightly different language in applying the Brunner test to the Cheesman facts. Id. at 360.[4]

It does not appear that the Sixth Circuit in Cheesman was proclaiming a test distinct from Brunner. In any event, we join the Second, Third and Seventh Circuits and adopt the Brunner test to determine whether, pursuant to 11 U.S.C. § 523(a)(8)(B), a debtor in bankruptcy may discharge a student loan.

II

APPLYING BRUNNER

A. Maintaining a Minimal Standard of Living on Current Income and Repaying the Loans

The bankruptcy court found that the Penas' net monthly income totaled $1,748 (Ernest's take-home pay of $1,370 plus Julie's disability payments of $378). Although USA Funds points out that the bankruptcy court did not include an increase in Ernest's wages that occurred between discovery and the time of trial, this does not suggest that the bankruptcy court was clearly erroneous in its finding. There was evidence before the bankruptcy court that Ernest's income fluctuated. Accordingly, we accept as not clearly erroneous the bankruptcy court's finding that the Penas' monthly net income was $1,748.

USA Funds also challenges the bankruptcy court's finding of the Penas' monthly expenses. USA Funds contends the bankruptcy court clearly erred by averaging the differing monthly expense figures the Penas provided at various stages of the proceeding — at the time they filed their Chapter 7 bankruptcy schedules, at the time they responded to interrogatories, and at the time of trial.

We cannot say the bankruptcy court clearly erred in averaging the Penas' monthly expenses. The method for calculating a debtor's average monthly expenses is a matter properly left to the discretion of the bankruptcy court. Although the Brunner test looks to the debtor's "current" income and expenses, where the evidence suggests that the debtor's income or expenses tend to fluctuate, it is not inappropriate to average figures over a reasonable period of time. To require strict reliance upon conditions existing at the moment of trial could result in an accurate snapshot but a distorted picture. We do not believe Congress intended to impose upon the debtor or the bankruptcy court such a narrow focus.

1113*1113 Using its averaging analysis, the bankruptcy court found that the Penas' expenses "on a monthly basis range[d] between $1,570 and $1,993." The court selected the $1,570 figure by using the Penas' answer to Interrogatory 20 in which they stated their expenses were anticipated to drop to that amount. The court selected the $1,993 figure by combining portions of the Penas' trial testimony with figures they provided on Schedule J of their bankruptcy petition. The court then averaged in the figure of $1,804 which was the amount of the Penas' actual monthly expenses at the time they answered Interrogatory 19. The average of these three figures is $1,789, and that is the figure the bankruptcy court found to be the Penas' average monthly expenses.

Subtracting the Penas' average monthly expenses ($1,789) from their net monthly income ($1,748), the Penas were faced with a monthly deficit of $41. Clearly, in these circumstances the Penas could not maintain a minimal standard of living and pay off the student loans.

B. Additional Circumstances

The bankruptcy court did not state which of its findings it considered applicable to the second prong of the Brunner test. However, two factual findings are relevant to this portion of the analysis: Julie's disability and the fact that Ernest's earning potential was not increased by his ITT education. USA Funds challenges these findings.

i. Julie's Disability

Based on Julie's testimony and a letter notifying her of her disability benefits, the bankruptcy court found that Julie suffered from a "mental medical condition .... variously diagnosed as depression, manic depression (bipolar disorder), schizophrenia and paranoia," which "prevents long-term stability." USA Funds argues that because this testimony was uncorroborated, it is insufficient to establish a medical disability. The cases relied upon by USA Funds do not support this argument.

In re Sands, 166 B.R. 299, 311 (Bankr. W.D.Mi.1994), held that although a diabetic debtor's uncorroborated testimony of past medical problems did explain his lack of employment prior to trial it did not establish a "disability that will persist for an extended period of time into the future." (emphasis added). The distinction between Sands and the present case rests in the nature of the disabilities. In Sands, the debtor had pretrial medical problems requiring surgery which interfered with his employment. Id. There was apparently no indication that the debtor had continuing problems other than his diabetes. Id.

In contrast, Julie suffers from a serious ongoing mental illness which will likely continue to interfere with her ability to work. She testified that since the age of 13 she has suffered from stabbing pains and she occasionally hears voices. In 1992, she became psychotic and had to be hospitalized. Due to her disability, she has not been able to hold any job for more than six months to a year. According to Julie, the administrative judge who awarded her disability benefits found her to be permanently mentally disabled. Although this was hearsay evidence, USA Funds did not object.

USA Funds also relies on portions of the lower court opinions in Brunner and In re Garrett, 180 B.R. 358 (Bankr.D.N.H.1995). In Garrett, one of the debtor's doctors provided a letter which stated in part, "`Avoid heavy lifting (clerical work, e.g. typing okay).'" Garrett, 180 B.R. at 364 (quoting letter from Dr. Taylor-Olson) (emphasis added). The court held, "Based on the evidence before the court, the court finds that Garrett's medical problems would not prevent her from obtaining the type of employment she is most suited for." Id.

In Brunner, the district court reversed the bankruptcy court's disability finding because it was "clearly erroneous," not because it relied on uncontroverted testimony by the debtor. Brunner, 46 B.R. at 757. The court noted the debtor "testified that she was capable of working." and that, "Although appellee testified that she was consulting a therapist, there is no evidence in the record that her depression and anxiety impair her capacity 1114*1114 to work. She has no `impairment' in any relevant sense of the word." Id. (emphasis added).

The present case is clearly distinguishable. In her testimony, Julie described her serious, ongoing mental disability which continues to prevent her from obtaining meaningful permanent employment. Further, her testimony is corroborated by an eight thousand dollar back disability award, continuing disability payments and the letter notifying her that she would receive disability payments. The bankruptcy court did not clearly err in its conclusion that Julie has an ongoing disability which prevents her from being employed.

ii. Ernest's Lack of Job Potential

USA Funds contends the bankruptcy court erred by considering evidence regarding the value of the ITT education. The Brunner court stated that "[c]onsideration of this factor is not only improper, it is antithetical to the spirit of the guaranteed loan program...." Brunner, 46 B.R. at 757.

We agree that consideration of educational value as a separate factor in analyzing undue hardship would improperly place too much emphasis on this evidence. However, as part of the second prong analysis, the value of Ernest's education is relevant to his future ability to pay off the student loans. The bankruptcy court did not err in considering that Ernest's income was not likely to increase as a result of his ITT education.

C. Good Faith

USA Funds finally contends that the bankruptcy court erred in finding that the Penas exhibited good faith in attempting to pay back the student loans.

The bankruptcy court found, "The debtors have made payments on the loans. After being laid off from Honeywell, the debtors were given a 90-day deferment, but then were unable to meet their obligations and filed chapter 7." These facts support the bankruptcy court's finding of good faith. They are quite different from the facts found in Brunner. There, the debtor failed to establish good faith because she "filed for discharge within a month of the date for the first payment of her loans came due,.... made virtually no attempt to repay, [and never] requested a deferment of payment, a remedy open to those unable to pay because of prolonged unemployment." Brunner, 46 B.R. at 758.

USA Funds also argues that the Penas' lack of good faith is demonstrated by the fact that when they received a lump sum payment of approximately $8,000 in back disability benefits for Julie, they bought a car and paid other bills.

Although there was no testimony regarding the purchase price of the car, it was approximately 20 years old when they bought it. With regard to the use of part of the lump sum payment to pay other bills, according to Ernest's testimony at trial, the Penas had "unsecured debts totalling $43,360 of which the student loan is approximately $8,685, excluding interest." USA Funds does not suggest why good faith would have required the Penas to pay the student loan debt prior to paying down portions of their other debts, when the other debts ($43,360 minus $8,685) were approximately four times the amount of the student loans.

We conclude the bankruptcy court did not clearly err in finding that the Penas exhibited good faith in attempting to pay back the student loans.

CONCLUSION

We adopt the Brunner test as the test to be applied to determine the "undue hardship" required to discharge student loans in bankruptcy pursuant to 11 U.S.C. § 523(a)(8)(B). Applying this test, the bankruptcy court did not clearly err in finding that (1) the Penas could not maintain a minimal standard of living and repay their student loans, (2) their unfortunate financial situation was likely to continue for a substantial portion of the repayment period, and (3) they made a good-faith attempt to pay the loans. The Penas established "undue hardship" within the meaning of 11 U.S.C. § 523(a)(8)(B), and they are entitled to a bankruptcy discharge of their student loans.

AFFIRMED.

[1] The Penas had one dependent at the time of trial.

[2] The Sixth Circuit has not yet adopted a test for determining undue hardship but referred to and applied Brunner in In re Cheesman, 25 F.3d 356 (6th Cir.1994) (noting the existence of several undue hardship tests, the court rephrased Brunner and applied its test to support the conclusion that the

student loans at issue "were dischargeable under any undue hardship test the [bankruptcy] court may have used...."). The bankruptcy courts in the Sixth Circuit have since applied "the Brunner test as restated in Cheesman." See, e.g., In re Dolph, 215 B.R. 832, 836 (6th Cir.BAP, 1998).

[3] See, e.g., 1st Cir.: In re Garrett, 180 B.R. 358 (Bankr.D.N.H.1995); 4th Cir.: Commonwealth of Virginia, State Educ. Assistance Authority v. Dillon, 189 B.R. 382 (W.D.Va., 1995), In re Ammirati, 187 B.R. 902 (D.S.C.1995), aff'd 85 F.3d 615 (4th Cir.1996), In re Walcott, 185 B.R. 721 (Bankr.E.D.N.C.1995); 5th Cir.: In re Coveney, 192 B.R. 140 (Bankr.W.D.Tex.1996), In re Raisor, 180 B.R. 163 (Bankr.E.D.Tex.1995), In re Stebbins-Hopf, 176 B.R. 784 (Bankr.W.D.Tex. 1994); 8th Cir.: In re Rose, 215 B.R. 755 (Bankr. W.D.Mo.1997); 9th Cir.: In re Shankwiler, 208 B.R. 701 (Bankr.C.D.Cal.1997); In re Hinkle, 200 B.R. 690 (Bankr.W.D.Wash.1996); In re Rosen, 179 B.R. 935 (Bankr.D.Or.1995); In re Raymond, 169 B.R. 67 (Bankr.W.D.Wash.1994); In re Lynn, 168 B.R. 693 (Bankr.D.Ariz.1994).

[4] Here are the two formulations, side by side, of the Brunner and Cheesman tests: Brunner Cheesman 1) "the debtor cannot maintain, based on current 1) "the [debtors] could not maintain a minimal income and expenses, a `minimal' standard of living standard of living for their family if they were for herself and her dependents if forced to required to repay their loans." repay the loans;" 2) "additional circumstances exist indicating that 2) "[T]here is no indication that the [debtors'] financial this state of affairs is likely to persist for a significant situation will improve in the foreseeable portion of the repayment period of the student future." loans;" and and 3) "the debtor has made good faith efforts to repay 3) "There is no evidence that the [debtors] did not the loans." act in "good faith." Brunner, 831 F.2d at 396. Cheesman, 25 F.3d at 360.

Tenth Circuit Law

The Tenth Circuit, in In re Polleys, adopted the Brunner test after comparing it to the Eighth Circuit's test. In our opinion, it did the people it intended to benefit by its decision a grave harm in doing so. You will note that the court seemed concerned about the harshness of the courts in the way they applied the *Brunner* test – and very rightly so. Soon after the decision in *Polleys,* the lower (and we do mean lower) courts of the Tenth Circuit were back to their same old tricks in *In re Buckand*, an absolute perversion of a case demonstrating all the worst, most heartless and brainless tendencies of court in applying the *Brunner* test. We include Buckland below but find it unworthy of analysis – just remember that the intelligence and compassion (if any) of the courts still make a lot of difference. If you draw Janice Miller Karlin as your bankruptcy judge in Kansas, change that if possible, as you won't find intelligence or compassion there.

Educational Credit Management Corp. v. Polleys, 356 F. 3d 1302 - Court of Appeals, 10th Circuit 2004

356 F.3d 1302 (2004)

EDUCATIONAL CREDIT MANAGEMENT CORPORATION, assignee of USA Group Loan Services, Inc., Defendant-Appellant,
v.
Nancy Jane POLLEYS, Plaintiff-Appellee.

No. 02-8059.

United States Court of Appeals, Tenth Circuit.

February 4, 2004.

1303*1303 1304*1304 Submitted on the briefs:[*]

Scott M. Browning and Craig R. Welling, Rothgerber, Johnson & Lyons, L.L.P., Denver, CO, for Appellant.

Stephen R. Winship, Winship & Winship, P.C., Casper, WY, for Appellee.

Before KELLY, HENRY, and LUCERO, Circuit Judges.

PAUL KELLY, JR., Circuit Judge.

Plaintiff-Appellee Nancy Jane Polleys sought a bankruptcy court discharge of federally guaranteed student loans. Defendant-Appellant Education Credit Management Corporation ("ECMC") is a non-profit company and fiduciary of the Department of Education that is charged with collecting such loans. It now holds these loans. Ms. Polleys initiated an adversary proceeding in bankruptcy, contending that the loans were dischargeable because payment of them would impose an undue hardship within the meaning of 11 U.S.C. § 523(a)(8). The bankruptcy court agreed and discharged the loans. The district court affirmed. ECMC now appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

Background

At the time of trial, Ms. Polleys was a 45-year old single mother of a teenaged girl. In 1993, she obtained a degree in 1305*1305 accounting financed with student loan funds. She has not repaid any amount on these loans. Her loans were later consolidated, and at the time of trial had a balance of approximately $51,000; repayment would require $420 per month over a period of 20 years. Aplt.App. 187.

Ms. Polleys was previously employed as an accountant. In 1994, she worked for one year in that capacity and earned $33,000. She had a job in public accounting in 1997, earning $13,771. According to Ms. Polleys, she was laid off from that job when the employer realized she was taking antidepressant medication and she asked for too much help. Ms. Polleys also tried self-employment, but could only get small bookkeeping jobs that paid less than $400 per month.

Since 1997, Ms. Polleys's annual income has been as high as $16,000 and as low as $3,000. Through August 2000, she earned minimum wage while employed at a greenhouse until she was laid off. Recently, Ms. Polleys and her daughter have lived on about $9,800, obtained from child support and two or three part-time jobs. Ms. Polleys receives $400 per month in child support payments.

Ms. Polleys and her daughter live in a rental property owned by her parents and pay no rent or utilities. She has a 1993 Subaru, which has significant body damage, but owns very little other property and no real property. Her budget contains no funds for emergencies. She qualifies for food stamps, and her income is below the federal poverty guidelines, as it was in the year before trial. Aplt.App. at 48, 128-29. Although her daughter is eligible for Medicaid, Ms. Polleys herself has no health insurance. She expects to receive unemployment compensation at some point in the future.

Ms. Polleys is apparently in good physical health, but she has been diagnosed with and continues to suffer from a psychological condition known as "cyclothymic disorder." She was once involuntarily committed. Aplt.App. at 32, 168. Ms. Polleys is currently prescribed Serzone, an antidepressant, twice a day. Aplt.App. at 132. Her mental health condition also apparently resulted in a suicide attempt. Aplt.App. at 24-27, 30-31, 159. She has ongoing expenses for her various medical and psychological conditions. Aplt.App. at 132-32.

On appeal, ECMC argues that the district court and the bankruptcy court not only selected the wrong standard for an undue hardship discharge, but also applied it incorrectly. Rather than relying upon a "totality of the circumstances" test, ECMC argues that the courts should have looked to the three-part test in *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395, 396 (2d Cir.1987), and concluded that Ms. Polleys was not entitled to a discharge.

Discussion

Section 523(a)(8) provides that an educational loan is not dischargeable in bankruptcy unless "excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." While this court is obliged to accept the bankruptcy court's undisturbed findings of fact unless they are clearly erroneous, we review de novo conclusions as to the legal effect of those findings. *United States v. Richman (In re Talbot),* 124 F.3d 1201, 1206 (10th Cir. 1997). Whether a debtor's student loans would impose an "undue hardship" under 11 U.S.C. § 523(a)(8) is a question of law. *Woodcock v. Chemical Bank, NYSHESC (In re Woodcock),* 45 F.3d 363, 367 (10th Cir.1995). It requires a conclusion regarding the legal effect of the bankruptcy court's findings as to the debtor's circumstances, and is therefore reviewed de novo. *Id.; see also* *Long v. Educ. Credit Mgmt.* 1306*1306 *Corp. (In re Long),* 322 F.3d 549, 553 (8th Cir.2003) (collecting cases).

A. *Undue Hardship Standard*

The bankruptcy code does not define "undue hardship," nor has the Tenth Circuit designated a test for the determination of the term. In an unpublished decision, *Cuenca v. Department of Education,* No. 94-2277, 1995 WL 499511, at *2 (10th Cir. Aug.23, 1995), we noted that undue hardship is something more than inconvenience or doing without luxuries, stating that "the discharge of a student loan should be based upon an inability to earn and not simply a reduced standard of living."

The court in *Cuenca* found that the debtor earned $36,000 per year, his wife did not work, he was not burdened with a number of old debts, and that he had derived a benefit from his education. In refusing to discharge the debtor's student loan, the court stated, "Mr. Cuenca's income is not at or below poverty level. Many families would be envious of his annual income." *Id.*

In enacting § 523(a)(8), Congress was primarily concerned about abusive student debtors and protecting the solvency of student loan programs. *See* *In re Andresen,* 232 B.R. 127, 137 (B.A.P. 8th Cir.1999). Congress itself had little to say on the dischargeability of student loans. The phrase "undue hardship" was lifted verbatim from the draft bill proposed by the Commission on the Bankruptcy Laws of the United States. The Commission noted that the reason for the Code provision was a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts." Report of the Comm'n on the Bankr. Laws of the United States, H.R. Doc. No. 93-137, Pt. II § 4-506 (1973), *reprinted in* Collier on Bankruptcy, App. Pt. 4(c) at 4-710 (15th ed. rev.2003) [hereinafter Commission Report]. Upon graduation, the typical student has little or no non-exempt property that can be distributed to creditors, but may have substantial future earning potential. Section 523(a)(8) was designed to remove the temptation of recent graduates to use the bankruptcy system as a low-cost method of unencumbering future earnings.

These bankruptcies contravened the general policy that "a loan ... that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." *Id.* The Commission implemented this policy by recommending the delay of dischargeability for five years,[1] a time period that "gives the debtor an opportunity to try to meet his payment obligation." *Id.* at 4-711. After five years, the exception would be lifted in recognition of the fact that "in some circumstances the debtor, because of factors beyond his reasonable control, may be unable to earn an income adequate both to meet the living costs of himself and his dependents and to make the educational debt payments." *Id.* During the first five years, however, a student loan could only be discharged if its payment would impose an "undue hardship" on the debtor.

The Commission noted that in order to determine whether nondischargeability of the debt will impose an "undue hardship," the rate and amount of his future resources should be estimated reasonably 1307*1307 in terms of ability to obtain, retain, and continue employment and the rate of pay that can be expected. Any unearned income or other wealth which the debtor can be expected to receive should also be taken into account. The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents, at a minimal standard of living within their management capability, as well as to pay the education debt. *Id.*

The various courts of appeals that have applied the undue hardship provision of § 523(a)(8) have adopted two tests. Most circuits have adopted a version of the Second Circuit's three-factored test in *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395, 396 (2d Cir. 1987). *See* *United States Dep't of Educ. v. Gerhardt (In re Gerhardt),* 348 F.3d 89, 91 (5th Cir.2003); *Hemar Ins. Corp. of Am. v. Cox (In re Cox),* 338 F.3d 1238, 1241 (11th Cir.2003); *United Student Aid Funds, Inc. v. Pena (In re Pena),* 155 F.3d 1108, 1114 (9th Cir.1998); *Penn. Higher Educ. Assistance Agency v. Faish (In re Faish),* 72 F.3d 298, 306 (3d Cir.1995);*Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman),* 25 F.3d 356, 359-60 (6th Cir. 1994); *In re Roberson,* 999 F.2d 1132, 1135-36 (7th Cir.1993). The Eighth Circuit has instead adopted a totality of the circumstances test in determining undue hardship. *See* *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews),* 661 F.2d 702, 704 (8th Cir.1981); *see also* *In re Long,* 322 F.3d at 554.

The three-part *Brunner* test requires the debtor to prove:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

831 F.2d at 396. Under the *Brunner* analysis, if the court finds against the debtor on any of the three parts, the inquiry ends and the student loan is not dischargeable. *Id.*

The facts in *Brunner* weighed heavily against the debtor, and thus the court refused to discharge the student loan. The debtor was not disabled or elderly and had no dependents. She was also skilled and well educated. She did not recount to the court any specific jobs that she had sought and been refused, and did not attempt to find a job outside of her chosen field of work. She only had $9,000 of student loan debt, but two months prior to the bankruptcy hearing, she withdrew $2,400 from her savings to buy a car. Moreover, she filed for discharge within a month of the date the first payment of the loans came due, made virtually no attempt to repay, and did not request a deferment of payment. *Brunner v. N.Y. State Higher Educ. Svcs. Corp. (In re Brunner),* 46 B.R. 752, 758 (S.D.N.Y.1985).[2]

1308*1308 Many subsequent courts employing the *Brunner* analysis, however, appear to have constrained the three *Brunner* requirements to deny discharge under even the most dire circumstances. *See, e.g.,* *Healey v. Mass. Higher Educ. (In re Healey),*161 B.R. 389, 395 (E.D.Mich.1993) (debtor failed first *Brunner* prong, because, although she was unable to maintain a "minimal" standard of living on her current income, she did not demonstrate that she was "making a strenuous effort to maximize her personal income within the practical limitations of her vocational profile"); *In re Walcott,* 185 B.R. 721, 723-24 (Bankr.E.D.N.C.1995) (debtor failed second *Brunner* prong because, since a $9.00 per hour position teaching literacy classes was "the highest hourly wage she has ever earned," "her current prospects appear brighter than at nearly any other time since her graduation"); *In re Roberson,* 999 F.2d at 1137 (debtor, who was divorced, unemployed, and living in a one-room apartment that did not have even a kitchen or toilet, failed second *Brunner* prong because he did not present a "certainty of hopelessness"); *In re Stebbins-Hopf,* 176 B.R. 784, 788 (Bankr.W.D.Tex. 1994) (debtor, who had nerve damage, bronchitis, and arthritis, and whose daughter had epilepsy, mother had cancer, and grandchildren had asthma, failed good faith prong because "[s]he intentionally chose to help her family financially").

These applications show that an overly restrictive interpretation of the *Brunner* test fails to further the Bankruptcy Code's goal of providing a "fresh start" for the honest but unfortunate debtor, *Stellwagen v. Clum,* 245 U.S. 605, 617, 38 S.Ct. 215, 62 L.Ed. 507 (1918), and can cause harsh results for individuals seeking to discharge their student loans.

Under the Eighth Circuit's "totality of the circumstances" test for undue hardship, bankruptcy courts should consider:

(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt-while still allowing for a minimal standard of living-then the debt should not be discharged.

Id. at 554-55 (citations omitted).

Relevant factors that different courts consider when examining the totality of circumstances of a debtor's situation include, but are not limited to, whether the debtor has made a good faith effort to negotiate a deferment of payment; whether the hardship will be long-term; whether the debtor has made any payments of the student loans; whether a debtor is permanently or temporarily disabled; whether the debtor has tried to maximize income and minimize expenses; whether the debtor has an ability to obtain gainful employment in her area of study; and the ratio of the student loan to the total indebtedness. *See* *Lawson v. Hemar Serv. Corp. of Am. (In re Lawson*), 190 B.R. 955, 957 (Bankr. M.D.Fla.1995).

According to the Eighth Circuit, the totality of the circumstances test is a "less restrictive approach" than the *Brunner* test. *Long,* 322 F.3d at 554. It recognizes the "inherent discretion" contained in § 523(a)(8), and allows "each undue hardship case to be examined on the unique facts and circumstances that surround the 1309*1309particular bankruptcy." *Id.; see also* *In re Johnson,* 121 B.R. 91, 93 (Bankr. N.D.Okla.1990) ("Rigid adherence ... to a particular test robs the court of the discretion envisioned by Congress in drafting [§ 523(a)(8)]."). It has also been suggested that the totality of circumstances test better considers the debtor's situation in light of the "fresh start" policies of § 523(a)(8), because it does not let a single factor become dispositive against a finding of undue hardship. *See, e.g.,* *In re Afflitto,* 273 B.R. 162, 170 (Bankr.W.D.Tenn.2001); *In re Law,* 159 B.R. 287, 292-93 (Bankr. D.S.D.1993).

On the other hand, it is not necessarily true that a totality of circumstances analysis of each debtor's situation avoids the harshness of the *Brunner* analysis. Under this standard, courts may choose from a multitude of factors and apply any combination of them to a given case, suggesting that just about anything the parties may want to offer may be worthy of consideration. As a result, it has an unfortunate tendency to generate lists of factors that should be considered — lists that grow ever longer as the case law develops. *See, e.g.,* *In re Smither,* 194 B.R. 102, 111 (Bankr.W.D.Ky.1996) (noting 11 non-exclusive factors a court must consider). "Legal rules have value only to the extent they guide primary conduct or the exercise of judicial discretion. Laundry lists, which may show ingenuity in imagining what *could* be relevant but do not assign weights or consequences to the factors, flunk the test of utility." *In re Plunkett,* 82 F.3d 738, 741 (7th Cir.1996).

An ad hoc, totality-of-the-circumstances approach has been justified as more in accordance with legislative intent. *See, e.g., Wilson v. Mo. Higher Educ. Loan Auth.,*177 B.R. 246, 248 (Bankr.E.D.Va. 1994) ("Each undue hardship discharge must rest on its own facts."). It is correct to state that Congress wanted undue hardship to be a fact-specific standard. As a practical matter, however, the two tests will often consider similar information — the debtor's current and prospective financial situation in relation to the educational debt and the debtor's efforts at repayment.

We do not read *Brunner* to rule out consideration of all the facts and circumstances. Under the first aspect of *Brunner,* the bankruptcy court is to inquire about whether the debtor can maintain a minimal standard of living while repaying the debt. This evaluation necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor's education and skill level. The second *Brunner* factor similarly requires an analysis of all the facts and circumstances that affect the debtor's future financial position. Finally, the good faith part includes an analysis of the debtor's situation in order to determine whether he has made a good faith attempt to repay the loan by maximizing income and minimizing expenses.

We therefore join the majority of the other circuits in adopting the *Brunner* framework. However, to better advance the Bankruptcy Code's "fresh start" policy, and to provide judges with the discretion to weigh all the relevant considerations, the terms of the test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged. Additionally, we think that the good faith portion of the *Brunner* test should consider whether the debtor is acting in good faith in seeking the discharge, or whether he is intentionally creating his hardship.

The first part of *Brunner* — that the debtor cannot maintain a minimal standard of living while repaying the student loan debt — comports with the legislative policy behind § 523(a)(8), that student loans "should not as a matter of policy be dischargeable 1310*1310 before [the debtor] has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt." Commission Report, *supra,* at 4-710. This first part should serve as the starting point for the undue hardship inquiry because information regarding a debtor's current financial situation generally will be concrete and readily obtainable.

The second *Brunner* element, which requires 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, properly recognizes that a student loan is "viewed as a mortgage on the debtor's future." *Id.* However, in applying this prong, courts need not require a "certainty of hopelessness." Instead, a realistic look must be made into debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like. Importantly, "courts should base their estimation of a debtor's prospects on specific articulable facts, not unfounded optimism," and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan. Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?,* 71 Tul. L.Rev. 139, 197 (1996).

Finally, an inquiry into a debtor's good faith should focus on questions surrounding the legitimacy of the basis for seeking a discharge. For instance, a debtor who willfully contrives a hardship in order to discharge student loans should be deemed to be acting in bad faith. Good faith, however, should not be used as a means for courts to impose their own values on a debtor's life choices.

B. *Did Ms. Polleys Establish Undue Hardship?*

Normally, we would remand for the bankruptcy court to apply the test we announce today. Such a remand is unnecessary because the bankruptcy court's factual findings are sufficiently complete to decide the undue hardship issue.

ECMC apparently does not dispute the bankruptcy court's implicit finding that Ms. Polleys satisfied the first part of the *Brunner* test, that she cannot maintain a minimal standard of living while repaying the student loan debt. As the bankruptcy court found, Ms. Polleys "has no discretionary income, lives at the largesse of her parents, and is unemployed." Bankr.Ct. Opin. at 4.

ECMC argues that Ms. Polleys cannot satisfy the second *Brunner* part — that circumstances indicate that her state of affairs is likely to persist for a significant portion of the repayment period of the student loans — because she cannot prove that she has a medical disability. ECMC, however, ignores the bankruptcy court's extensive findings of Ms. Polleys's emotional health. The court found that Ms. Polleys "suffers from debilitating emotional problems which, though counterproductive, are obviously out of her control." *Id.* Moreover, "medication was necessary for her to function, but that medication affected her memory and communication skills negatively." *Id.* Ms. Polleys's "inability to hold a job due to emotional outburst and a low tolerance for stress is not a problem of her own making, but affects her ability to earn more than a nominal living." *Id.* This condition is "likely to persist into the foreseeable future, and even with a modest improvement in income [there is] no way that Ms. Polleys can repay $51,000 plus accruing interest." *Id.*

1311*1311 Ms. Polleys's mental health problems are at least as substantial and long lasting as the disability the Ninth Circuit found to be sufficient to preclude the debtor from paying her student loan in *In re Pena,* 155 F.3d 1108 (9th Cir.1998). In *Pena,* the court held that the debtor's depression "prevent[ed] long-term stability" and was "likely [to] continue to interfere with her ability to work." *Id.* at 1113.

The fact that Ms. Polleys stipulated that she "has no medical or physical condition that prevents her from retaining work" does not carry the day for ECMC. D. Ct. Opin. at 5. Ms. Polleys did not stipulate that she has no medical condition that *affects* her ability to work or earn a substantial income. The bankruptcy court found just the opposite and its findings are not clearly erroneous.

More fundamentally, although ECMC argues that "*typically,* prospective undue hardship is proven by medical disability," Aplt. Br. at 25 (emphasis added), the cases do not suggest that a permanent medical disability is any kind of prerequisite to discharging a student loan debt. In *In re Cheesman,* 25 F.3d 356 (6th Cir. 1994), there was no evidence of any medical problems. The wife had lost her job after she took a maternity leave; the husband earned a gross salary of $1,123 per month. Although the husband was hoping for a promotion at his current job, and the wife was actively seeking employment, the court noted that there was "no assurance ... that either will obtain their objectives," *id.* at 360, and that the Cheesmans were headed "in a downward spiral and will continue to go deeper in debt," *id.* at 359. Thus, although a permanent medical condition will certainly contribute to the unlikelihood of a debtor earning enough money to repay her student loan debt, it is by no means necessary if the debtor's situation is already bleak.

Additionally, ECMC's reliance on *In re Brightful,* 267 F.3d 324 (3d Cir.2001), for the proposition that a debtor must show "additional circumstances" to support a discharge is misplaced. In *Brightful,* the bankruptcy court made no finding of the "nature of Brightful's emotional and psychiatric problems, or how these problems prevent her from being gainfully employed." *Id.* at 330. In contrast to Ms. Polleys's situation, Brightful was "intelligent, physically healthy, currently employed, possesses useful skills as a legal secretary, and has no extraordinary, non-discretionary expenses." *Id.* Moreover, Brightful's only daughter was just two years away from the age of majority, and therefore Brightful's obligation to support her was nearly at an end. *Id.*

Finally, the facts indicate that Ms. Polleys is seeking to discharge her student loan debt in good faith. ECMC admits that the good faith inquiry requires determining whether a debtor's circumstances are the result of "factors beyond her reasonable control." Aplt. Br. at 30. However, ECMC bases its claim of lack of good faith only on (1) the fact that Ms. Polleys has never made a single payment on her student loans, and (2) her decision to leave a good paying job and move to Wyoming to live with her parents.

First, the failure to make a payment, standing alone, does not establish a lack of good faith. *See In re Coats,* 214 B.R. 397, 405 (Bankr.N.D.Okla.1997) ("There is no *per se* requirement that a debtor pay a certain percentage or minimum amount of the loans at issue in order to meet the good faith requirement."). Additionally, unlike in *Brunner,* where the debtor "filed for discharge within a month of the date for the first payment of her loans came due ... [and never] requested a deferment of payment,"46 B.R. at 758, Ms. Polleys did not immediately seek to 1312*1312 discharge her student loan obligation after it came due. Rather, she consolidated the loan, and entered into the deferral programs. When the student loan creditors demanded payments of $800.00 per month, she tried to negotiate with them. Ms. Polleys's efforts to cooperate with her lenders show that she was acting in good faith in working out a repayment plan.

Moreover, the good faith part can be satisfied by a showing that Ms. Polleys is actively minimizing current household living expenses and maximizing personal and professional resources. *In re Woodcock,* 149 B.R. 957, 961 (Bankr.D.Colo. 1993). Ms. Polleys could do little more to minimize her current household living expenses: she lives in a basement apartment in her parents' home, and pays no rent or utilities other than her phone bill. Any failure on her part to maximize her personal and professional resources is due to her mental health condition, which is beyond her control.

Finally, there is no indication that Ms. Polleys is "attempting to abuse the student loan system by having [her] loans forgiven before embarking on lucrative careers in the private sector." *Cheesman,* 25 F.3d at 360. On the contrary, Ms. Polleys has tried to use her education to maximize her income. She has tried to work for accounting firms, to no avail. Then she tried to open her own accounting practice, and that failed too. She has not been able to pass the CPA Exam despite several attempts. Additionally, Ms. Polleys has even sought employment outside her accounting field, only to be laid off from her last job in a local nursery. It is clear that Ms. Polleys has been trying her best in good faith to become financially independent, but that circumstances beyond her control are keeping her from reaching that goal. In light of these factors, Ms. Polleys meets the "undue hardship" requirement of § 523(a)(8).

AFFIRMED.

LUCERO, J., concurring.

Every month millions of young Americans who have availed themselves of the type of student loan program at issue here faithfully make their payments. It is beyond dispute that the level of sacrifice required to make these payments is a great one; many no doubt make such payments even when they consider the burden an "undue hardship." It is important that the student loan program operate free of the cynicism that would infest the system if a disparate standard for discharge of loans would develop, leaving some students enduring the hardship of making loan payments while others are freed of their commitment on a floating standard. Because this case appears to be exceptional, I concur in the result reached by my esteemed colleagues.

I write separately because I disagree with the majority's adoption of *Brunner's* second prong, which requires "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." *Brunner v. New York State Higher Educ. Servs. Corp.,* 831 F.2d 395, 396 (2d Cir.1987). I disagree as to two aspects of the second prong: (1) the nature of the evidence of *medical disability* that we should require of debtors who seek to discharge their student loans based on medical conditions; and (2) the evidence required regarding the likely *duration* of the circumstances giving rise to "undue hardship."

As to the first issue, I am concerned that the majority opinion fails to enunciate a clear standard to measure "undue hardship" when a debtor asserts a medical disability as evidence. I would replace 1313*1313 *Brunner's* more subjective second prong with an objective standard for determination of medical disability, requiring that the bankruptcy court consider only evidence that rises to a level of "reasonable medical probability."

The "reasonable medical probability" standard is not a novel one; in fact, it is ubiquitous in other contexts in both federal and state law. *See, e.g., St. Anthony Hosp. v. U.S. Dep't. of Health and Human Servs.,* 309 F.3d 680, 694 (10th Cir.2002)(applying a statutory "reasonable medical probability" standard in the context of the Emergency Medical Treatment and Labor Act's "reverse-dumping" provisions); *LeMaire v. United States,* 826 F.2d 949, 954 (10th Cir.1987) (concluding that Colorado law required that medical opinions be founded on "reasonable medical probability" in order to be admissible); *Houser v. Eckhardt,* 168 Colo. 226, 450 P.2d 664, 668 (1969) (concluding that "[a] medical opinion is admissible if founded on reasonable medical probability").

With respect to the issue of duration of the circumstances, the majority requires that the disability last for a "significant period of the loan." It is my view that "significant period" is not sufficiently defined and is likely to lead to inconsistent outcomes. I would therefore reject this subjective inquiry and instead require an objective standard for determination of the duration requirement, leaving it to the medical experts to declare whether the disability will or will not extend for the duration of the loan. What is needed is legislation which excuses the payment of loans during periods of disability; however, in the absence of such legislation, bankruptcy courts ought to discharge student loans only when the medical record is clear that the disability involved is an enduring one.

Of course, factors other than medical disability can and should be taken into consideration in making the ultimate decision as to whether a debtor's circumstances constitute "undue hardship" and warrant the discharge of a loan. To the extent that the decision is based on a medical disability determination, however, those medical factors should be based on objective rather than subjective criteria.

[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R.App. P. 34(a); 10th Cir. R. 34.1(G). The cause therefore is ordered submitted without oral argument.

[1] After the enactment of the Higher Education Amendments of 1998, Pub.L. No. 105-244, 112 Stat. 1837 (1998), student loan debts are no longer automatically dischargeable after five years. Thus, only the "undue hardship" exception to nondischargeability currently exists. *See infra* note 2.

[2] It should also be noted that the Bankruptcy court decision to which the *Brunner* undue hardship test applied was based on the Bankruptcy Code as it existed in 1985, which still provided for an automatic discharge for five-year-old student loans that could not be repaid. *See* *Brunner*, 46 B.R. at 753. Thus, even if debtors could not establish undue hardship in repaying the student loan, they would still be able to obtain discharge of student loans if they merely filed for bankruptcy after five years from when the repayments of their loans began.

In 1998, however, the Higher Education Amendments of 1998 eliminated the automatic dischargeability of student loans, leaving only the undue hardship exception to nondischargeability. The repeal of the five-year discharge (which at that time had been lengthened to seven years) means that a debtor's only chance of discharging her student loans is by proving "undue hardship."

In re Buckland, 424 BR 883 - Bankr. Court, D. Kansas 2010

424 B.R. 883 (2010)

In re Anthony James BUCKLAND and Betty Elizabeth Buckland, Debtors.
Anthony James Buckland, Plaintiff,
v.
Educational Credit Management Corporation, Defendant.

Bankruptcy No. 09-40010. Adversary No. 09-7011.

United States Bankruptcy Court, D. Kansas.

February 12, 2010.

886*886 Anthony James Buckland, pro se.

Betty Elizabeth Buckland, pro se.

Jackie A. Rapstine, Office of United States Attorney, Topeka, KS, N. Larry Bork, Topeka, KS, for Defendant.

MEMORANDUM OPINION AND ORDER DENYING DISCHARGE OF STUDENT LOAN DEBT

JANICE MILLER KARLIN, Bankruptcy Judge.

This matter is before the Court on Plaintiff's Adversary Complaint,[1] which seeks a determination that repayment of his student loan debt owed to the Defendant, Educational Credit Management Corporation ("ECMC"), would constitute an undue hardship and, therefore, that the debt is dischargeable pursuant to 11 U.S.C. § 523(a)(8).[2] The Court conducted a trial, reviewed all the evidence submitted in this case, weighed the credibility of the witnesses, and is now prepared to rule. This is a core matter over which this Court has jurisdiction.[3]

I. FINDINGS OF FACT

The Court makes the following findings of fact based upon the stipulations entered into between the parties in the Pretrial Order,[4] and the evidence presented at trial. Debtors were 45 and 47 years of age, respectively, when they filed their voluntary petition under Chapter 7 of the Bankruptcy Code on January 6, 2009.[5] No one is dependent on them for support, although 887*887 Mrs. Buckland is required to pay $140/month in child support for a 12 year old child who lives with his father.

According to Debtors' Statement of Financial Affairs, neither has been employed since May 14, 2007. Debtors were granted a discharge pursuant to 11 U.S.C. § 727 on April 20, 2009.

On February 12, 2009, Debtors initiated this adversary proceeding, seeking a determination that the repayment of their respective student loan debts would create an undue hardship on them, and that all their student loan debts should thus be discharged. Mrs. Buckland was an original plaintiff, and the Department of Education a defendant, because she sought the discharge of approximately $40,000 in student loans she owed to the U.S. Department of Education. Mr. Buckland's cause of action centered on a July 24, 2002 consolidated loan currently held by Educational Credit Management Corporation ("ECMC"). The amount due and owing on the consolidation loan with ECMC, as of March 25, 2009, was $75,018.81, with interest accruing at the fixed rate of 6.25%.

According to Debtors, several factors beyond their control have left them without the ability to repay their student loan debts. Among these include the tragic death of their teenaged daughter in April 2008 from cancer[6] and the resulting emotional difficulties experienced by both Debtors following her death. Mrs. Buckland also testified that she suffers from physical ailments that prevent her from working, including back problems resulting from an injury she sustained while working as a nurse's aid.

The U.S. Department of Education recently elected not to contest a finding of undue hardship as it related to Mrs. Buckland, and an agreed Journal Entry finding her $40,000 debt dischargeable has been entered.[7] Thus, Mr. Buckland's debt to ECMC is the only claim that remained for trial.

Mr. Buckland claims that his extended period of unemployment is due to factors outside his control. While he was helping care for their dying daughter, he was terminated from his employment with the Mission Township Fire Department in May 2007, and he has not been steadily employed since. Mr. Buckland also testified that he successfully operated a business known as B & B Contractors from 1989 until 2005. The company performed radon testing, but he had stopped operating the radon business because he could not simultaneously handle that business and his firefighting responsibilities. Mr. Buckland testified that he attempted to restart this business after he lost his job in 2007, but quickly decided the current housing market made his attempt to make a profit from that business impossible.

Mr. Buckland does not contend that he is physically or emotionally unable to work, but rather that he has had difficulty finding employment since his involuntary departure from the Mission Township Fire Department, where he was the Chief for two years.[8] He claims he has been "blackballed" and that is why he is not getting888*888 hired in this geographic area notwithstanding that he was the prior medical, fire and water rescue trainer for the Township (and the team leader), had excellent firefighter and management skills, was the fire chief, and notwithstanding that he can still pass the strength and agility tests for firefighters. Both he and his brother, who testified on his behalf, say he is physically capable of doing any job, because he is strong and "very healthy." His brother noted he would be an excellent candidate for a variety of jobs, including substitute teacher or home security positions, neither of which category of job he has apparently applied for since losing the firefighter job.

Debtor also admitted that he

> "holds certification in ice water rescue, dive rescue, jet ski rescue, swift water rescue, flood water rescue, Kansas emergency medical tech-intermediate, National firefighter 1 & 2, national incident command system-100, 200, 700, wild land firefighter, PADI & NAUI dive master, underwater investigator, Kansas mobile live fire instructor, Kansas fire inspections, National fire training officer 1 & 2, Kansas emergency medical training office 1 & 2, BA in Anthropology, minors in history and mental health care from Washburn University. Cert in Heating & Air Conditioning from Kansas City Vo-Tec."[9]

On his Schedule I filed with the Petition, he listed his occupation(s) as "Radon Contractor/Firefighter/EMT." Debtor agreed at trial he was still a qualified EMT. Accordingly, even Mr. Buckland perceives he has many skills that could lead to employment.

The Court also notes that Debtor received some Honor Roll grants while attending school; the fact that he did well in school was corroborated by Debtor's testimony. The Court found Debtor to be quite articulate, with an excellent vocabulary, and the ability to formulate logical answers to questions. He also represented himself in this Adversary Proceeding, and did a good job in doing so. All of these attributes would serve Debtor well in seeking and maintaining employment.

Debtors testified that they have taken serious measures to limit their living expenses. They testified they no longer eat out or enjoy entertainment that comes with a cost. They have eliminated cable television, eliminated their land-line telephone, and now share a cell phone plan with another daughter. Finally, Debtors were able to obtain a loan modification on their home mortgage, which reduced their monthly house payments. According to Schedule J filed in Debtors' bankruptcy case, their current monthly expenses are just over $1,900.00.

Additional facts will be discussed below, when necessary.

II. ANALYSIS

The Bankruptcy Code is generally designed to provide debtors with the opportunity to obtain a "fresh start" by eliminating or restructuring their debts. However, there are certain debts Congress has determined should either not be discharged in a bankruptcy petition, or that can only be discharged under limited circumstances. As one of these exceptions to a full fresh start, the Bankruptcy Code creates a presumption that student loans 889*889 are non-dischargeable in the absence of undue hardship to the debtor or the debtor's dependents.[10] The Debtor has the burden of proving that the student loan is dischargeable.[11]

The Tenth Circuit has adopted the three-part *Brunner* test for analyzing whether a debtor has shown that his or her student loan debt should be discharged because it would cause undue hardship.[12] Under this test, a debtor must prove:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself or her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating 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.[13]

If the court finds the debtor has failed to prove any of these three elements, the inquiry ends and the student loan is not dischargeable.[14] As noted recently by the Tenth Circuit Bankruptcy Appellate Panel, the Tenth Circuit "makes it clear that it disdains `overly restrictive' interpretations of this test, and concludes that it should be applied to `further the Bankruptcy Code's goal of providing a `fresh start' to the honest but unfortunate debtor[.]'"[15]

The first prong of the *Brunner* test requires Debtor to demonstrate "more than simply tight finances."[16] The Court requires more than temporary financial adversity, but typically stops short of utter hopelessness.[17] "A minimal standard of living includes what is minimally necessary to see that the needs of the debtor and [his] dependents are met for care, including food, shelter, clothing, and medical treatment."[18] Further, a court should also be hesitant to impose a spartan life on family members who do not personally owe the underlying student loan, particularly when those family members are children.[19] All of Debtor's children are adults; none reside with him or depend upon him for support (except that Mrs. Buckland is required to pay $140/month child support for her child who lives with his father).

The second prong of the *Brunner* test, which requires that additional circumstances exist indicating that the Debtor will be unable to repay the loans while maintaining a minimal standard of living for a significant portion of the repayment period, "properly recognizes that a student loan is viewed as a mortgage on the debtor's future."[20]However, the debtor need not show a "certainty of hopelessness."[21] 890*890 Instead, the Court must take a realistic look into the debtor's circumstances and the debtor's ability to "provide for adequate shelter, nutrition, health care, and the like."[22]

The third prong of the *Brunner* test requires the Court to determine if the debtor has made a good faith effort to repay the loan "as measured by his [or] her efforts to obtain employment, maximize income and minimize expenses."[23] The inquiry into a debtor's good faith "should focus on questions surrounding the legitimacy of the basis for seeking a discharge."[24] A finding of good faith is not precluded by a debtor's failure to make a payment.[25] "Undue hardship encompasses a notion that a debtor may not willfully or negligently cause his own default, but rather his condition must result from factors beyond his control."[26]

The Tenth Circuit has also held that a debtors' willingness to consolidate his loan under the William D. Ford Federal Direct Student Loan Program's[27] Income Contingent Repayment Plan ("ICRP") or Income Based Repayment ("IBR") is an important factor to consider in determining whether a debtor has made a good faith effort to repay a student loan debt.

According to the evidence presented at trial by way of an affidavit submitted by ECMC,[28] under either the ICRP or the IBR, a debtor is allowed to repay a student loan debt over a period of up to 25 years and the amount of payments required under an ICRP are contingent upon the debtor's income.[29] Under the ICRP, if a debtor is making less than 100% of the federal poverty line (which is the case here), then no payments are required. If the debtor earns more than the federal poverty line, the payments are capped at 20% of the debtor's adjusted gross income that exceeds that amount. Similarly, under the IBR, if a debtor is making less than 150% of the federal poverty line (which is the case here), then no payments are required. If the debtor earns more, the loan payment is capped at 15% of the amount earned over that level. Apparently except for the highest earners, that usually works out to less than 10% of a debtor's income. In addition, there is some forgiveness of debt for public service, including jobs providing for public safety. Any debt that remains due at the end of the 25 year period is forgiven.

The Tenth Circuit has also clarified that its adoption of the *Brunner* test does not "rule out consideration of all the facts and circumstances" surrounding the case.[30] The first prong of the *Brunner* test, whether the debtor can maintain a minimal standard of living while repaying 891*891 the debt, "necessarily entails an analysis of all relevant factors, including the health of the debtor and any of his dependents and the debtor's education and skill level."[31] The second prong of the *Brunner* test "similarly requires an analysis of all the facts and circumstances that affect the debtor's future financial position."[32] Finally, the third prong "includes an analysis of the debtor's situation in order to determine whether he has made a good faith attempt to repay the loan by maximizing income and minimizing expenses."[33] In addition, the Tenth Circuit has been clear in holding that the terms of the *Brunner* test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged.

1. Debtor has shown that, given his current income and expenses, he cannot maintain a minimal standard of living while repaying the student loan debt.

The first prong of the *Brunner* test requires Debtor to demonstrate that he cannot maintain a minimal standard of living while repaying the student loan debt given his current income and expenses. The Court finds that Debtor easily met this prong, and that ECMC did not seriously contest this evidence. Mrs. Buckland has been unemployed since December 2006 and Mr. Buckland has been unemployed since May 2007. Neither Debtor has any income, and neither one has had any for nearly three years.

Apparently Debtors have been living solely off the generosity of family, unemployment benefits, occasional sales of plants at farmers markets, and food stamps to help cover necessary living expenses during this time. The testimony at trial indicated that both of those streams of income have likely either dried up, or are soon to dry up, although Mrs. Buckland has applied for (and been denied) some disability benefits. Based on the fact that neither Debtor has any regular income, the Court finds that he has shown that he lacks the ability to maintain a minimal standard of living if forced to repay the student loan debts at this time.

2. Debtor has not shown that there are any additional circumstances that exist indicating the current state of affairs is likely to persist for a significant portion of the repayment period of the student loans.

Although the Court finds that Debtor currently lacks the ability to repay his student loan debt, Debtor failed to show that his current state of affairs is likely to persist for a significant portion of the repayment period of the student loan (unless he chooses for it to persist). In analyzing this prong of the *Brunner* test, the Court is required to take a "realistic" look into Debtor's circumstances.

The Court finds that although Mrs. Buckland is currently unable to work, it is more likely than not that her inability to work will not continue for a significant period of time. Five significant pieces of evidence concerning Mrs. Buckland's future employment were admitted into evidence. The first was a letter written by her primary care physician, Dr. Norris. In that letter, dated November 17, 2008, Dr. Norris indicates that "Betty Buckland has suffered significant stress since the death of her daughter last spring. She has been unable to work. Her mental health is improving and she will hopefully 892*892 be able to return to work in the future. She is unable to work at this time. If I can be of further help, please feel free to contact me."[34]

The second piece of evidence was contained on Debtors' Schedule I, current Income of Individual Debtor(s). One of the Debtors wrote, in freehand, at the bottom of this schedule, filed with the Petition on January 6, 2009, "Hope there is income of some kind soon!"[35] In that same Schedule, Debtors indicated that she had previously worked as a "CNA," which the Court assumes from her testimony means a certified nurse aide/assistant.

The third piece of evidence came in the form of Debtors' amended Schedule I, filed January 20, 2009. This time one of them wrote at the bottom "We hope to develop employment in the first few months of 2009."[36] Both of these Schedule I exhibits show that at least before they filed this adversary proceeding, they intended to get new employment. Fourth, Mrs. Buckland had applied for disability benefits, but had recently been denied, indicating that at least some governmental entity has recently decided she does not meet the required qualifications for those benefits. Finally, in responses to Interrogatory No. 23, Betty indicated she had been looking for work, which shows she did not, at that point, think she was unemployable.[37]

Although it is unclear precisely when Mrs. Buckland will be able to return to gainful employment, Debtors themselves, and Mrs. Buckland's physician, all thought it was likely to occur in 2008 or 2009. As noted above, it is Debtor's burden to prove that he will not be able to make payments on the student loan debts for a significant portion of the repayment period, and the Court finds Debtor has failed to show that his wife will not be able to re-enter the work force if she chooses to do so for some portion of the repayment period on his loans. Because they testified that they share all income and expenses equally, if she were to return to work, the funds would be available to either defray living expenses, or to assist in payment of the student loans.

The Court finds that Mr. Buckland's prospects for becoming gainfully employed are admittedly much clearer (and better) than those of his wife. By all accounts, Mr. Buckland is a very healthy, able-bodied individual with a college degree and significant work and management skills and experience. His brother testified that he was qualified to do many jobs, and Mr. Buckland admitted as much, himself.

The Court simply finds there are no additional facts or circumstances that lead the Court to believe Mr. Buckland's unemployment is likely to last a significant portion of the repayment period, provided he makes a good faith, conscientious effort to obtain future employment. Although that employment may not be in his chosen profession of firefighting, or at the wages he would like, there is no reason to believe that employment is not on the horizon if he truly wants it to be.

3. Debtor has not shown that he has made a good faith effort to repay the student loan debt.

The final prong of the *Brunner* test requires Debtor to show that he has made a good faith effort to repay the loans. As noted above, this inquiry is measured by Debtor's "efforts to obtain 893*893 employment, maximize income and minimize expenses,"[38]and "should focus on questions surrounding the legitimacy of the basis for seeking a discharge."[39] The Court finds the evidence at trial did not establish that Debtor had made a good faith effort to repay the loans.

First, the Court notes that Debtor never made a single payment after his loans were consolidated. The loans were consolidated in July 2002, which was well prior to their daughter's illness, death and his ensuing unemployment. Debtor was employed in a job he liked (in fact, two jobs for a time), and when he signed the loan documents in 2002, he promised to make payments around $480 a month. Although the failure to make any payments is not, by itself, sufficient to support a finding of a lack of good faith, it is a relevant factor for the Court to consider, especially when no payments were made during a time in which Debtors were both employed and had steady income.[40]

Second, the Court does not find that Debtor has made a good faith effort to maximize his income or obtain employment in an effort to repay the student loan debt. Mr. Buckland previously worked as firefighter in the Topeka area. That employment was terminated in May 2007, and he has remained unemployed since. The evidence at trial showed that Mr. Buckland has sought very few employment opportunities outside of the firefighting profession (and almost all of those types of jobs he applied for were at management levels). In addition, although he generically stated he had applied for jobs "all over the nation," he then admitted it would be extremely difficult for him to relocate (without ever explaining why). The Court did not find credible his testimony that he conducted an active, nationwide search for jobs.

In fact, Mr. Buckland testified that in addition to applying for several chief firefighter positions or director positions in close-by communities, as well as apparently one line-firefighter position in Shawnee Heights, the only jobs he has applied for over a 30-month period were several positions with Stormont Vail hospital, a position at the Target Distribution Center in Topeka, one application at one Mexican food restaurant, at a brother-in-law's auto shop, and on-line for unidentified civilian positions at Ft. Riley and Ft. Leavenworth. Although Mr. Buckland may have applied for other jobs, there was no evidence that those efforts were widespread or in any way intensive, and he provided no documentary proof of those applications at trial.

Mr. Buckland also testified that he tried to renew his former radon inspection business, but indicated that the current housing market has all but eliminated any possibility of turning that into a profitable business at this time, or for the foreseeable future. Given that Mr. Buckland has been unemployed for nearly three years, commencing at a time when the employment market was not as depressed as it is now, the Court finds the evidence he presented regarding his efforts to obtain new employment does not support a finding of a good faith effort to maximize his income so he could repay his student loans. For whatever reason, Debtor seems satisfied with living at his below-poverty level.

894*894 The Court finds that Debtor's failure to obtain employment over the past few years is attributable to two factors. First is the April 2008 death of their daughter. The Court understands the devastating effect such a loss (and the illness leading up to the death) would have on any family, and certainly places no fault on Debtors for failing to obtain employment during the time of their daughter's illness and for a reasonable time following her death.[41] And although Mrs. Buckland may have residual issues making employment difficult (as the Department of Education apparently concluded when agreeing to discharge her loan), Mr. Buckland has indicated both an ability and an interest in returning to work following the death of his daughter.

The Court finds that Mr. Buckland's lack of employment is more directly attributable to the second factor—a desire to limit his employment to a particular profession, and to predominantly management positions within that profession, at that. The Court certainly understands Mr. Buckland's desire to return to his chosen profession, but also finds that such a desire should have by now given way to the need to pay his debts, including the student loan debt. If in fact Mr. Buckland were making a good faith effort to repay his student loan debt, the Court finds that he would have made a much more determined, and broadened, effort to obtain employment.

Finally, the Court also finds that Debtor's refusal to consider the William D. Ford ICRP or IBR also supports a finding that he has not made a good faith effort to repay the student loan debt. Under both of these plans, the amount of monthly payments on the student loan debt is calculated based upon Debtor's monthly income. If Debtor earned less than 100% of the federal poverty line (150% for the IBR), he would not be obliged to make any payments while that condition persisted. After 25 years, any remaining debt would be forgiven. The failure to seriously consider these alternatives is an important factor to consider in the good faith analysis.[42]

Mr. Buckland testified he was not interested in the ICRP for two reasons.[43] First, under the ICRP, payments can be spread out over as long as 25 years, which would mean Mr. Buckland would be 72 when he emerged from the repayment plan. Second, Mr. Buckland is concerned that there could be significant tax consequences when any remaining debt is forgiven, if in fact he is unable to repay the entire debt over 25 years. Mr. Buckland suggested the ICRP was essentially an "invisible debtor's prison."

The Court understands Mr. Buckland's concerns about the ICRP, and does not find his refusal to take part in that program to be a major factor in finding that he had not made a good faith effort to repay the debt. However, the Court finds 895*895 that his refusal to consider the program is a factor in the Court's decision, even if it is not a major factor. Although the Court understands Mr. Buckland's reluctance to deal with this student loan debt until he is 72 years old, the Court must also note that Mr. Buckland elected to take out the vast majority of those loans when he was in his mid-30's (1995-1997). Further, he opted to consolidate them when he was over 40 years of age. Debtors who opt to take out student loans later in life to further their education, which this Court believes is a very worthwhile endeavor, should not then be allowed to use their age as an excuse why they should not have to repay those loans.[44] Lenders would be reluctant to provide student loans to older than average students if that were the case.

As for the concern about the potential future tax consequences if any of the debt is forgiven, the Court finds those concerns are legitimate, albeit somewhat speculative, since it is unknown whether there actually will be tax consequences if that debt is forgiven in 25 years, or even if there will be any debt to forgive at that point. The Court finds that Mr. Buckland's desire to avoid repaying any of his student loan debt because there is a possibility of negative tax consequences several years into the future does not support a finding of good faith.

III. CONCLUSION

For the foregoing reasons, the Court finds that the student loan debt owed by Mr. Buckland to ECMC should be excepted from Debtor's discharge pursuant to 11 U.S.C. § 523(a)(8). Although the Court finds that Debtor cannot repay the student loan debt and maintain a minimal standard of living at this time, the Court also finds that Debtor's current financial situation is not likely to (and need not) continue for a significant portion of the repayment period of these student loans, and that Mr. Buckland has not made a good faith effort to maximize his income, or to repay the loans. Based upon these findings, the Court finds that the repayment of the student loan debt should not be discharged.

IT IS, THEREFORE, BY THE COURT ORDERED that student loan debt owed by Anthony Buckland to Educational Credit Management Corporation is excepted from Debtor's discharge.

IT IS FURTHER ORDERED THAT judgment is entered against Plaintiff, Anthony Buckland, and in favor of Defendant, Educational Credit Management Corporation, on Anthony Buckland's complaint.

SO ORDERED.

[1] Doc. 1.

[2] This bankruptcy was filed after October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All future statutory references are thus to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101-1532 (2005), unless otherwise specifically noted.

[3] 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(I) (core proceeding).

[4] Doc. 69.

[5] Exhibit F.

[6] The Court recognizes that this child was Mrs. Buckland's biological child, and Mr. Buckland's step-daughter. However, the Court will refer to the child as "their" daughter, as Debtors did at trial, because it is clear that both Debtors considered this child to be their daughter.

[7] See Journal Entry Granting Discharge of Student Loan Debts Owed to the United States of America on Behalf of the Department of Education by the Plaintiff, Betty Elizabeth Buckland (Doc. 64) entered October 2, 2009.

[8] *See* response to Interrogatory 4, Exhibit M.

[9] *See* Exhibit L, Debtor's responses to Interrogatory No. 9. In a supplemented response, he also included that he held a certification or license as an Interior Structure Fire Instructor, SCBA Fit Tester, DRI Underwater Scene Investigator, DRI Swift-Water Rescuer, FEMA Incident Command Systems, Kansas EMT-I, and National Environment Health Association Radon Mitigation Contractor. *See*Exhibit M, Interrogatory No. 9.

[10] 11 U.S.C. § 523(a)(8).

[11] *See* *In re Lindberg,* 170 B.R. 462 (Bankr. D.Kan. 1994).

[12] *Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys),* 356 F.3d 1302, 1309 (10th Cir.2004) (holding that the Tenth Circuit would adopt three-pronged test established by *Brunner v. New York State Higher Educ. Services Corp.,* 831 F.2d 395 (2nd Cir. 1987)).

[13] *Id.* at 1307.

[14] *Id.*

[15] *Alderete v. Educ. Credit Mgmt. Corp.,* 308 B.R. 495, 503 (10th Cir. BAP 2004).

[16] *See* *Innes v. State of Kansas (In re Innes),* 284 B.R. 496, 504 (D.Kan.2002).

[17] *Id.*

[18] *Id.*

[19] *Windland v. United States Dept. of Educ. (In re Windland),* 201 B.R. 178, 182-83 (Bankr.N.D.Ohio 1996).

[20] *Polleys,* 356 F.3d at 1310 (internal quotations omitted).

[21] *Id.*

[22] *Id.*

[23] *In re Innes,* 284 B.R. at 510.

[24] *Polleys,* 356 F.3d at 1310.

[25] *In re Innes,* 284 B.R. at 510.

[26] *In re Faish,* 72 F.3d 298, 305 (3rd Cir. 1995).

[27] 20 U.S.C. § 1087e(d)(1)(D); 34 C.F.R. § 685.100 *et seq.*

[28] ECMC Exhibit AA.

[29] According to the affidavit, the ICRP is available to any borrower, while the IBR is available to borrowers who can make a showing of partial financial hardship, meaning that the standard (10-year) repayment amount exceeds 15% of the household adjusted gross income. It appears that Debtor would be eligible under either of these programs.

[30] *In re Polleys,* 356 F.3d at 1309.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Emphasis added.

[35] Exhibit F.

[36] Exhibit H.

[37] Exhibit O, Interrogatory 23.

[38] *In re Innes,* 284 B.R. at 510.

[39] *In re Polleys,* 356 F.3d at 1310.

[40] Debtors were not married to each other in 2002, instead becoming common law married in 2006, but Mr. Buckland's former spouse was employed during this time, although she did not make much money.

[41] Debtor admitted into evidence some rejection letters for a few jobs. Those letters were dated both before and after the death, so it appears Debtor did make minimal effort to find jobs during the illness and in the period soon after her death.

[42] *In re Alderete,* 412 F.3d 1200, 1206 (10th Cir.2005).

[43] At trial, the testimony centered almost exclusively on the "ICRP" rather than the "IBR." However, based upon the information contained in the affidavit contained in Exhibit AA, it appears as though the program that was actually being discussed was the IBR, based upon ECMC's counsel's assertions that the payments would be limited to 15% of Debtor's income that exceeded 150% of the federal poverty line. In any event, Debtor did not indicate a willingness to enter into either of these programs, and his reasons for refusing to do so would apply equally under either program.

[44] *Cf. In re Woody,* 494 F.3d 939, 954 (10th Cir.2007) (holding, admittedly in a HEAL loan context, that Congress did not intend to allow a debtor who spent decades not making loan payments, even after working full time for several years, to receive a discharge because his health begins to fail as he approaches retirement age).

Eleventh Circuit Law

We include five cases from the Eleventh Circuit: In re Cox, In re Williams, In re Gesualdi, In re Ivory, and In re Mosley. By clicking on the links in this paragraph, you will be taken to the specific part of this appendix to find the case.

In ***In re Cox***, the Eleventh Circuit adopted the *Brunner* case with little discussion as it proceeded to the real issue in the case, which was whether a student loan borrower who had not shown "undue hardship" could nevertheless have some part of his or her student loan debt discharged (bearing in mind that all the non-student loan debt would automatically be discharged). The court concluded that it could not be. The facts in the case were not sympathetic (as presented by the court opinion, at least), and one could see how the lower court had found that undue hardship had not been demonstrated.

It was a little more surprising, one might say, that the lower court had discharged some of the debt under general "equitable" principles which it believed entitled it to reduce a debtor's post-bankruptcy debt. It seems clear that the appropriate tactic to use in this situation would have been for the debtor to prove that some part of the loan *was* undue hardship. For a court decision that would suggest that argument and might provide authority for it, see In re Zook, a case from the D.C. Circuit. That is apparently what the court believed, although it stated it's conclusion in a different way.

In ***In re Williams*** and ***In re Gesualdi***, the facts were also not sympathetic. So much so that *Gesualdi* might almost be a text-book case of what NOT to say. ***Ivory***, on the other hand, was almost the reverse of that – so much so that one wonders why in the world the government bothered to oppose her effort to discharge the debt. It should not have. We include these latter cases because they will provide you a basis for understanding the way the courts look at these cases, some of the sources they use as references, and many case citations to assist you in finding other case law that may be closer to your own situation.

338 F.3d 1238 (2003)

In Re: Ronald Jay COX, Debtor.

Hemar Insurance Corporation of America, Illinois Student Assistance Commission, Plaintiffs-Appellees,

v.

Ronald Jay Cox, Defendant-Appellant.

No. 02-10788.

United States Court of Appeals, Eleventh Circuit.

July 23, 2003.

1239*1239 Marilyn Sue Bright, Atlanta, GA, for Cox.

Luke A. Kill, Scoggins & Goodman, P.C., Alonzo H. Long, U.S. Atty., Atlanta, GA, Paul J. Morochnik, Thompson, O'Brien, Kemp & Nasuti, P.C., Norcross, GA, for Plaintiffs-Appellees.

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and NELSON[*], District Judge.

PER CURIAM:

I. INTRODUCTION

Appellant, Ronald Jay Cox (Cox) filed a petition seeking protection from his creditors pursuant to Chapter 7 of the Bankruptcy Code, with the United States Bankruptcy1240*1240 Court for the Northern District of Georgia. As a part of his petition, he filed an adversary proceeding under 11 U.S.C. § 523(a)(8)[1]; claiming that repayment of his student loans will result in "undue hardship" and seeking a full discharge of his student loan indebtedness.

This Circuit has yet to adopt a specific standard for determining "undue hardship" under § 523(a)(8). For the reasons stated herein, we adopt the standard set forth by the Court of Appeals for the Second Circuit in *Brunner v. New York State Higher Education Services Corp.,* 831 F.2d 395 (2d Cir.1987) (per curiam). Further, we agree with the district court's conclusion that, because Cox will suffer no "undue hardship" in repaying his student loan debts, his student loan indebtedness is non-dischargeable.

II. BACKGROUND

Ronald Jay Cox has several degrees to his credit, namely an A.A. in business administration from Gainesville Junior College, a B.A. in business administration from North Georgia College, a J.D. from Thomas Cooley Law School, and an LL.M. in taxation from the University of Alabama. In addition to his considerable education, Cox is licensed to practice law in Michigan and Georgia. To fund his education, Cox acquired several student loans. Consequently, he now owes $65,340.35 to the Illinois Student Assistance Commission, $19,511.62 to the Educational Resources Institute, Inc., $18,000 to HEMAR Insurance Corp., and $11,388.91 to the United States Government, for a total of more than $114,000.

After obtaining his LL.M. in taxation, Cox established a law practice in Cumming, Georgia. Unfortunately, Cox's law practice turned out to be an unprofitable venture. As a result, Cox began winding down his failing law practice and secured employment with his brother's landscaping company, earning $24,000 per year. Because of his deteriorating financial situation, on March 19, 2001, Cox filed the underlying loan discharge action pursuant to § 523(a)(8), claiming that he could not pay off his student loan debts without suffering "undue hardship." 11 U.S.C. § 523(a)(8).

At the trial concerning Cox's claim, the bankruptcy court made the following findings: (1) Cox was unable to maintain a minimal standard of living, given the totality of the circumstances; (2) Cox had made good faith efforts to repay his student loans; and (3) given Cox's skills and education, his current inability to repay his student loans is not likely to be a permanent condition.[2] Because the bankruptcy court did not consider Cox's current financial situation to be a "permanent condition," it held that Cox did not make "out a case of undue hardship as contemplated by 11 U.S.C. § 523(a)(8) as would justify total discharge of [his] student loans." However, in light of "the magnitude of the amount of the existing student loans and the accumulation of interest," the bankruptcy court ordered a partial discharge, 1241*1241 reducing Cox's student loan indebtedness from approximately $114,000 to $50,000, and established a 25-year plan for repayment of that amount at a 7% annual interest rate.

Cox's creditors appealed the bankruptcy court's decision to the district court. The creditors argued that under the terms of § 523(a)(8), student debt cannot be discharged, even in part, absent a showing of "undue hardship." The district court agreed with the bankruptcy court that Cox had not demonstrated undue hardship. However, the district court held that in the absence of undue hardship, student loan debt could not be discharged, in whole or in part. It thus reversed the bankruptcy court's partial discharge of Cox's student debt. This appeal followed.

III. STANDARD OF REVIEW.

This Court has jurisdiction over this matter under 28 U.S.C. § 158(d). The district court's and bankruptcy court's factual findings are reviewed for clear error. *Lykes Bros., Inc. v. United States Army Corps of Engr's,* 64 F.3d 630, 634 (11th Cir.1995). A factual finding is not clearly erroneous unless "this court, after reviewing all of the evidence, [is] left with the definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks omitted). This Court conducts a *de novo* review of "determinations of law, whether from the bankruptcy court or the district court." *In re Bilzerian,* 100 F.3d 886, 889 (11th Cir.1996) (per curiam).

IV. DISCUSSION

A. The Brunner test of "undue hardship."

Although § 523(a)(8) clearly requires a showing of "undue hardship," for discharge of student loan indebtedness in bankruptcy proceedings, the code neglects to define the term. As a result, "[b]ankruptcy courts use a wide variety of tests to determine whether the debtor has demonstrated undue hardship. While these tests have received varying degrees of acceptance, no particular test authoritatively guides or governs the undue hardship determination." *In re: Faish,* 72 F.3d 298, 302 (3d Cir.1995) (alteration in original) (internal quotation marks omitted). This court has yet to address the appropriate factors to be considered in determining when a debtor has shown "undue hardship." Several of our sister circuits have addressed this issue, however, and adopted the test set forth by the Second Circuit in *Brunner. See* *In re Ekenasi,* 325 F.3d 541, 546-50 (4th Cir.2003); *In re Brightful,* 267 F.3d 324, 327-28 (3d Cir.2001); *In re Rifino,* 245 F.3d 1083, 1087-88 (9th Cir. 2001); *In re Roberson,*999 F.2d 1132, 1135-37 (7th Cir.1993). *But see* *In re Long,* 322 F.3d 549, 553 (8th Cir.2003) (applying "the totality-of-the-circumstances test"); *In re Hornsby,* 144 F.3d 433, 437 (6th Cir.1998) ("[d]eclining to adopt any one test"). As we find the reasoning of the majority of our sister circuits persuasive, we now hold that the *Brunner* test is the appropriate test for determining "undue hardship."

The *Brunner* court adopted the following three-part test for the "undue hardship" exception to § 523(a)(8):

> [to establish "undue hardship," the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.
>
> 831 F.2d at 396.

Cox claims the 1998 amendments to the statute, removing the only alternative 1242*1242method of discharging student loans and leaving "undue hardship" as the sole avenue for relief, rendered the *Brunner* test inappropriate because "the *Brunner* test now produces harsh, and sometimes absurd, results." We disagree. As the Seventh Circuit recognized in *In re Roberson,*

> The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.

999 F.2d at 1137. Congress's intent to make it harder for a student to shift his debt responsibility onto the taxpayer is clear from the 1998 amendments. Moreover, the *Brunner* test leaves an avenue of relief and is an effective tool for identifying those debtors whose earning potential and circumstances make it unlikely that they will produce the means necessary to repay the student loans while maintaining a minimal standard of living. This situation, in essence, is what constitutes an "undue hardship" — not the mere inability to pay, but an inability to pay that is likely to continue for a significant time. The *Brunner* test is an effective tool in analyzing that potential.

B. Partial discharge pursuant to § 523(a)(8).

Although the Bankruptcy Court found, as a matter of fact, that repayment of his student loan indebtedness would not impose an "undue hardship" on Cox, the court granted Cox a partial discharge of his debt. Whether a partial discharge of student loan indebtedness is possible without a finding of "undue hardship" is a question of first impression for this Court.

The language of § 523(a)(8) clearly and unambiguously provides that the bankruptcy laws do "not discharge an individual debtor from *any* debt" arising from a student loan. 11 U.S.C. § 523(a)(8) (emphasis added). The only exception is that an individual debtor may be discharged of his student loan indebtedness upon a showing that "excepting such debt from discharge ... will impose an *undue hardship*on the debtor." *Id.* (emphasis added). There is no other language within § 523(a)(8) that could reasonably be construed to permit a discharge, partial or otherwise, absent a finding of "undue hardship." "[T]he duty of interpretation does not arise" for a statute when the plain language of the statute admits to only one meaning. *Caminetti v. United States* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

Cox contends this construction of § 523(a)(8) goes against Congress's intent that bankrupt debtors be given a "fresh start." However, the history of § 523(a)(8) is consonant with our interpretation. Shortly after Congress established the Guaranteed Student Loan Program under the Higher Education Act of 1965, students began discharging their educational obligations through the Bankruptcy Act. Consequently, in 1976 Congress enacted Section 493A of the Education Amendments of 1976, which provided:

> A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act *only if such discharge is granted after the five-year period* (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, *except that prior to the expiration of that five-year period, such loan may be released* 1243*1243 *only if the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship* on the debtor or his dependents.

Education Amendments of 1976, Pub.L. No. 94-482, 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976) (repealed 1978)) (emphasis added). In 1978 the essence of Section 439A was re-codified in § 523(a)(8). Congress subsequently amended § 523(a)(8) in 1979, 1984, and 1990, with each amendment further limiting the dischargeability of student loans. Finally, in 1998 Congress left "undue hardship" as the only possible avenue for a debtor to obtain a discharge of student loan indebtedness. *See* 11 U.S.C. § 523(a)(8). Considering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness.

Furthermore, there is no evidence of an intent to permit judicially created exceptions to § 523(a)(8) via the "fresh start" principle. According to the plain meaning of § 523(a)(8), a debtor cannot obtain a discharge of student loan indebtedness without a finding of "undue hardship."

Cox contends that the bankruptcy court's equitable powers under 11 U.S.C. § 105(a) allow it to construct an equitable remedy, namely a partial discharge, even if the "undue hardship" burden is not met.[3] The bankruptcy court's equitable powers, however, do not allow it to override the specific statutory language found in § 523(a)(8). It is a well settled rule of statutory interpretation that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari,* 417 U.S. 535, 550-51, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Because the specific language of § 523(a)(8) does not allow for relief to a debtor who has failed to show "undue hardship," the statute cannot be overruled by the general principles of equity contained in § 105(a). To allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of § 523(a)(8) mandates would be "tantamount to judicial legislation and is something that should be left to Congress, not the courts." *In re Mallinckrodt,* 260 B.R. 892, 904 (Bankr.S.D.Fla.2001), *rev'd,* 274 B.R. 560 (S.D.Fla.2002).

AFFIRMED.

[*] Honorable Edwin L. Nelson, United States District Judge from the Northern District of Alabama, sitting by designation. This case is being decided by quorum due to the death of Judge Nelson on 17 May 2003. *See* 28 U.S.C. § 46(d).

[1] Section 523(a)(8) provides:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, *unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor* and the debtor's dependents.

11 U.S.C. § 523(a)(8) (emphasis added).

[2] Although the bankruptcy court did not refer to it by name, this three prong analysis of "undue hardship" is consistent with the test set out in *Brunner. See* 831 F.2d at 396.

[3] Cox contends that, although the bankruptcy court applied a "totality of the circumstances" analysis rather than the *Brunner* test, the bankruptcy court's factual findings demonstrate that he met the*Brunner* test. Although the bankruptcy court did not explicitly name the "undue hardship" standard it employed, the record clearly reflects that it was using the three-prong *Brunner* test. Using this test, the bankruptcy court concluded that Cox did not establish undue hardship to justify total discharge of his loans. In proceedings before the district court, Cox argued the Bankruptcy Court's decision was "correct as a matter of law and fact" and he failed to file any kind of cross-appeal claiming the bankruptcy court's findings were clearly erroneous. Because the equitable principles of judicial estoppel prevent Cox "from deliberately changing positions according to the exigencies of the moment," we decline to disturb the findings below in these circumstances. *Burnes v. Pemco Aeroplex, Inc.,* 291 F.3d 1282, 1285 (11th Cir.2002).

505 B.R. 330 (2013)

IN RE: Scott C. GESUALDI, Debtor.
Scott C. Gesualdi, Plaintiff
v.
Educational Credit Management Corporation, Defendant.

CASE NO.: 07-12637-BKC-PGH ADV. NO.: 12-01816-BKC-PGH-A.

United States Bankruptcy Court, S.D. Florida. West Palm Beach Division

Filed August 6, 2013.

333*333 John D. Eaton, Shawde & Eaton, P.L., Weston, FL, for ECMC, Defendant.

Gary J. Lublin, Orlando, FL, for Sallie Mae Inc., Defendant.

CHAPTER 7

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Paul G. Hyman, Chief Judge, United States Bankruptcy Court

THIS MATTER came before the Court for trial on May 28, 2013, upon Scott C. Gesualdi's (the "Plaintiff) *Amended Complaint to Determine Dischargeability of Debt Pursuant to § 523(a)(8)* (the "Amended Complaint") (ECF No. 39) against Educational Credit Management Corporation, commonly known as ECMC (the "Defendant"). On December 6, 2012, the Defendant filed its *Answer to Amended Complaint* (the "Defendant's Answer") (ECF No. 45). On April 25, 2013, the Plaintiff and the Defendant filed a *Stipulation of Certain Facts* ("Joint Stipulation") (ECF No. 64).[1]

FINDINGS OF FACT

I. Stipulated Facts

On April 13, 2007, the Plaintiff filed a voluntary chapter 7 petition for bankruptcy relief. The Plaintiff is a 46-year-old married man with one minor child born on November 25, 2008. J. Stip. at ¶ 3. The Plaintiff commenced the instant adversary proceeding on August 12, 2012, by filing a *Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(8)* (ECF No. 1) against Sallie Mae, Inc. *Id.* at 334*334 ¶ On November, 12, 2012, the Defendant filed its *Motion to Join Educational Credit Management Corporation as Party Defendant Due to Transfer of Interest, and to Dismiss Sallie Mae, Inc.* (the "Motion to Join") (ECF No. 32). *Id.* at ¶ 5. On December 4, 2012, the Plaintiff filed his Amended Complaint to name ECMC as a defendant. *Id.*at ¶ 6. On December 6, 2012, the Court entered the *Order on Motion to Join Educational Credit Management Corporation as Party Defendant Due to Transfer of Interest, and to Dismiss Sallie Mae, Inc.* (ECF No. 43). *Id.* at ¶ 7. The Plaintiffs Amended Complaint, filed against the Defendant after the Defendant replaced Sallie Mae, Inc. as the proper party, asserts undue hardship and seeks an order discharging the student loan debt now owed to the Defendant.

The debt at issue in this adversary proceeding is a student loan (the "FEE LP Loan") made pursuant to the Federal Family Educational Loan Program ("FFELP") and currently held by the Defendant. *Id.* at ¶ 8.[2] The FFELP Loan was used to consolidate and pay off ten separate loans that the Plaintiff obtained over a period of time between 1987 and 1995. *Id.* According to the Defendant, as of April 16, 2013, the total amount owed by the Plaintiff to the Defendant under the FFELP Loan is $135,115.92, with interest accruing at the rate of $18.97 per diem. *Id.* at ¶ 9. Since the FFELP Loan's issuance, the Plaintiff has made $452.55 in payments. *Id.* at ¶ 10.

The FFELP Loan is eligible for both consolidation and income based repayment ("IBR") as part of the William D. Ford Direct Loan Program (the "Ford Program").[3]*Id.* at ¶ 12. In addition, the Plaintiff is eligible for IBR in the FFELP program with his lender. *Id.* Under the IBR option, the repayment period is a maximum of 25 years. *Id.*at ¶ 13. Monthly payments are equal to 15% of the difference between the Plaintiffs Adjusted Gross Income ("AGI") and 150% of the United States Department of Health & Human Services Poverty Guidelines, divided by twelve. *Id.* The payments under an IBR plan are recalculated annually based upon the Plaintiffs previous year's AGI.*Id.* at ¶ 14. According to the Plaintiffs 2012 tax return, which the Plaintiff and his wife filed jointly, the Plaintiff had an AGI in 2012 of $41,630.00 and a family size of three. *Id.* Based upon the Plaintiffs 2012 tax return, the Plaintiffs estimated monthly student loan payment under an IBR plan would be $154.19, as calculated by the following formula: (($41,630.00 $29,295.00) × 0.15)/12. *Id.* Under the IBR option, at the end of the 25 year period, any balance that remains would be canceled by the Secretary of Education. *Id.* at ¶ 15. Although he was apprised of his eligibility for both the Ford Program and the IBR option, the Plaintiff has not sought to consolidate or to repay his debt under an IBR plan. *Id.* at ¶ 17.[4]

335*335 II. Findings of Fact Based on Evidence Presented at Trial

In addition to the facts set forth in the Joint Stipulation, the Court makes the following additional findings of fact based upon the evidence which was presented at trial. In 1990, the Plaintiff received a Bachelor of Science ("B.S.") degree in Zoology from the University of Florida. Def.'s Ex. B, Resp. to Interrog. 15. From October 1992 through May 1995, the Plaintiff attended the University of Liverpool, where he pursued a degree in veterinary medicine. *Id.* In May 1995, the Plaintiff withdrew from the University without receiving a degree. *Id.* From August 2002 through August 2009, the Plaintiff attended Florida Atlantic University ("FAIT") and successfully obtained a Doctor of Philosophy ("Ph.D.") degree in Integrative Biology. *Id.* While at FAU, the Plaintiff worked as a teaching assistant and taught lab courses for undergraduates. Def.'s Ex. B, Resp. to Interrog. 4. The Plaintiff earned $20,000.00 per year in his position at FAU. *Id.*

From December of 2009 through December of 2010, the Plaintiff held a postdoctoral training position at Florida International University ("FIU"), where he performed cancer research and managed graduate students. *Id.* The Plaintiffs salary in this position was $36,000.00 per year. Def.'s Ex. B, Resp. to Interrog. 4. The Plaintiff was ultimately terminated from FIU, but was never told the reason.

The Plaintiff remained unemployed until August 2012, when he obtained a position at the University of Miami as an adjunct instructor for a biology laboratory. *See* Def.'s Ex. B, Resp. to Interrog. 4. The Plaintiff earned $2,666.67 per semester in that position. *Id.* As of May 1, 2013, the Plaintiff was employed in an adjunct faculty position at the University of Miami. *See* Pl.'s Ex. 6. The Plaintiffs gross monthly salary in that position is $667.67, and his net monthly salary is $629.00. *Id.*

Recently, the Plaintiff was offered an adjunct faculty position at Palm Beach State College which would begin on August 25, 2013. *Id.* This position would pay Plaintiff a gross monthly salary of $1,051.50, or a net monthly salary of $992.11. *Id.* The Plaintiff testified at trial, however, that he did not know if the position will be available as it depends on whether enough students enroll in the course. As of the date of the trial, no students had signed up for the class.

The Plaintiffs wife is 44 years old and works full time as a programmer at the University of Miami. *Id.* The Plaintiffs wife's gross monthly salary is $3,253.05, and her net monthly salary, after various deductions, is $2,220.11. *Id.* Included within these automatic monthly deductions are deductions for family health insurance, disability, and dental insurance, as well as a voluntary 403(B) retirement contribution in the monthly amount of $162.65.

Currently, the Plaintiffs and his wife's combined gross monthly income is $3,919.72, and their combined net monthly income after taking into account automatic deductions is $2,849.16. If the Plaintiff obtains the position at Palm Beach State College starting in August 2013, then their combined gross monthly income will likely be $4,304.55, and their combined net monthly income will likely be $3,212.22.

According to their tax returns, Plaintiff and his wife had an AGI for the years 2009 through 2012, including tax refunds, as follows:

336*336

Year	AGI	Refund
2012	$41,630	$1,376
2011	$45,169	$ 100
2010	$56,023	$ 896
2009	$44,997	$2,526

Def.'s Exs. E, F, G, H, and I.

The Plaintiffs monthly household expenses are as follows:

Rent	$ 1,600.00
Electricity	$ 200.00
Water and Sewer	$ 80.00
Telephone	$ 90.00
Food	$ 350,00
Clothing	$ 25.00
Dry Cleaning	$ 20.00
Medical and Dental	$ 250.00
Transportation	$ 200.00
Recreation	$ 20.00
Day Care (pre-k)	$ 450.00

Total: $ 3,285.00

Pl.'s Ex. 6. With respect to efforts to minimize his expenses, the Plaintiff testified that he and his wife have made many sacrifices, including eliminating their gym memberships. Moreover, the Plaintiff and his wife drive older model cars — his car is twelve years old and his wife's car is six years old. The Plaintiff and his wife do not take vacations, and their monthly recreation expenditure is to take their son to Chuck E. Cheese. From the testimony, it is unclear as to whether the Plaintiff could obtain less expensive housing at the end of their current lease period.

The Plaintiff testified that in addition to the FEE LP Loan, he also has another student loan which is not the subject of this adversary proceeding. The Plaintiff acknowledged that he is making payments on that student loan, but the amount of those payments is unclear.

Additionally, the Plaintiff is aware of the Ford Program and of the availability of IBR option as a means of repaying his student loan debt. Nevertheless, he admitted that he has not sought to repay his student loan debt under the IBR option and has no intention to do so because he believes he will face a tax liability for debt forgiveness at the end of the 25 year applicable period. He testified that such a tax burden at the age of 71 would be onerous.

With respect to the Plaintiffs efforts to improve his job situation, the Plaintiff testified that he has had difficulty obtaining employment in his chosen field of science 337*337and academia. According to the Plaintiff, it is difficult to obtain employment in the scientific field unless you have recently published authoritative work. The Plaintiff has not had any recent publications. Moreover, his former professor failed to publish the Plaintiffs work as the Plaintiff expected. Instead, some of the Plaintiffs research was published, but credited to others.

Relevantly, the Plaintiff is the primary caregiver for his 4-and-a-half-year-old son because his wife works full time from 8:00 a.m. until 6:30 p.m. Their son presently attends private pre-kindergarten classes at the Bambini Academy for which the Plaintiff and his wife pay $450.00 per month. *See* Pl.'s Ex. 6. The Plaintiffs son attends a morning session from 8:30 a.m. until 1 p.m. Thus, the Plaintiff testified that he can only work during the morning hours or after his wife returns from work.

The Plaintiff testified that he applied for positions at the University of Miami and FIU, and as noted above. Palm Beach State College. He also applied to several other companies such as Scripps and Bayer Health Care. In addition, he is enrolled in programs with several employment agencies and placement services.

The Plaintiff also testified that he has made efforts to locate a position outside the scientific field, namely, as a police dispatcher. The Plaintiff testified that he completed certain paperwork that was sent to him, but he was unable to secure the position. He suggested that he is overqualified for many positions and thus is limited in his ability to find a job.

Additionally, the Plaintiff indicated that he has sleep apnea, Attention Deficit Disorder, depression, and anxiety. Def's Ex. B., Resp. to Interrog. 9. Nevertheless, there was no evidence presented to show that any of those conditions precluded him from working, either in his chosen field or other fields.[5] While such conditions may have an effect on his ability to work diligently, the testimony did not suggest that the Plaintiff was totally disabled such that he is precluded from holding a job.

CONCLUSIONS OF LAW

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b). This is a core proceeding under 28 U.S.C. § 157.

II. The Plaintiff Has Not Met His Burden Under the *Brunner* Test and, as such, the Debt Owed to the Defendant Constitutes a Nondischargeable Student Loan Debt

The U.S. Bankruptcy Code states that a discharge under section 727 does not discharge an individual debtor from any debt:

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for —

(A)

(i) an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) or the Internal 338*338 Revenue Code of 1986, incurred by a debtor *who* is an individual

11 U.S.C. § 523(a), Thus, under § 523(a)(8), the Court may discharge student loan debt only upon a showing of undue hardship by the debtor. Because Congress failed to define what constitutes an "undue hardship," many federal courts have adopted the three-prong test set forth in *Brunner v. New York State Higher Education Services.* 831 F.2d 395 (2d Cir.1987). The three-prong *Brunner* test requires that the debtor show:

(1) that the debtor cannot maintain, based on current income and expenses, a `minimal' standard of living for herself and her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) that the debtor has made good faith efforts to repay the loans.

Hemar Ins. Corp. v. Cox (In re Cox), 338 F.3d 1238, 1241 (11th Cir.2003) (*quoting* *Brunner,* 831 F.2d at 396).[6] The Eleventh Circuit adopted the test reasoning that "the *Brunner* test leaves an avenue of relief and is an effective tool for identifying those debtors whose earning potential and circumstances make it unlikely that they will produce the means necessary to repay the student loans while maintaining a minimal standard of living." *Id.*

The burden of proving each of the *Brunner* elements is on the debtor. *Educ. Credit Mgmt. Corp. v. Stanley,* 300 B.R. 813, 817 (N.D.Fla.2003) (*citing* *Brightful v. Pa. Higher Educ. Assistance Agency (In re*

Brightful), 267 F.3d 324, 326 (3rd Ch-.2001)("The debtor has the burden of establishing each element of [the *Brunner*] test by a preponderance of the evidence.")). Further, the *Brunner* test is, in general, a difficult standard to meet. *See id.* ("Congress's intent to make it harder for a student to shift his debt responsibility onto the taxpayer is clear from the 1998 amendments"). All three prongs of the *Brunner* test must be satisfied before a discharge based on undue hardship can be granted. Therefore, if any one of the three requirements is not met, the student loan debt cannot be discharged. *The Cadle Co. v. Webb (In re Webb),* 132 B.R. 199, 202 (Bankr.M.D.Fla.1991); *Russotto V. Educ. Credit Mgmt. Corp. (In re Russotto),* 370 B.R. 853, 856 (Bankr. S.D.Fla.2007). Based upon the evidence presented at trial, the Plaintiff did not meet his burden of establishing any of the three required elements of the *Brunner* test.

A. The Plaintiff Can Maintain a Minimal Standard of Living if Forced to Repay the Student Loan Owed to the Defendant

The first prong of the *Brunner* test requires that the debtor show he cannot maintain, based on current income and expenses, a "minimal standard of living" for himself and his dependents if forced to repay the loans. As stated by the United 339*339 States District Court for the Northern District of Florida:

Under *Brunner,* the debtor is entitled to a "minimal standard of living" for herself and her dependents, but the debtor is not entitled to maintain whatever standard of living she has previously attained, nor the level she would maintain if required to repay the debt. "Minimal" does not mean preexisting, and it does not mean comfortable.

Stanley, 300 B.R. at 817-18. In essence, "[a] debtor cannot succeed under this prong by demonstrating that the repayment of the student loans would [merely] require him to make some major personal and financial sacrifices and live within a restricted budget." *In re Kehler,* 326 B.R. 142, 147 (Bankr.N.D.Ind.2005). This is because "the first prong of the *Brunner* analysis requires more than a showing of tight finances."*Pa. Higher Educ. Assistance Agency v. Faish,* 72 F.3d 298, 306 (3d Cir.1995), *cert. denied,* 518 U.S. 1009, 116 S.Ct. 2532, 135 L.Ed.2d 1055 (1996). Additionally, the "Plaintiff must demonstrate that []he has maximized [his] ability to produce adequate income to pay [his] expenses and [his] student loans." *In re Brosnan,* 323 B.R. 533, 538 (Bankr. M.D.Fla.2005) (*citing* *Perkins v. PHEAA* 318 B.R. 300, 305 (Bankr.M.D.N.C.2004) (citations omitted)).

The evidence presented at trial shows that the Plaintiff and his family can maintain a minimal standard of living if the Debtor's student loan is not discharged because of the variety of repayment options available. To begin with, in "the vast majority of the reported opinions in which the dischargeability of a student loan debt owed by a married debtor was at issue, the courts have considered the earnings of both the debtor and his or her spouse for the purpose of evaluating the quality of plaintiffs lifestyle," *In re White,* 243 B.R. 498, 509 (Bankr.N.D.Ala.1999) (numerous citations omitted), *reh'g denied,* 243 B.R. 515 (Bankr.N.D.Ala.1999). *See also, In re Greco,*251 B.R. 670, 679 (Bankr.E.D.Pa. 2000) (stating that assistance to the debtor from any source must be weighed as a factor in determining the debtor's overall financial picture).[7] The Court agrees that 340*340 the earnings of the household must be taken into account when evaluating the Plaintiffs ability to maintain a minimal standard of living.

When analyzing a debtor's household income, the federal poverty guidelines are worth noting. The guidelines provide a starting point by which to measure a debtor's financial situation, particularly when the debtor earns several times the poverty level. *See* *Stanley,* 300 B.R. at 818 (court noted that debtor's income was four times the poverty level for a family size of one); *Hart v. ECMC (In re Hart),* 438 B.R. 406, 412 (E.D.Mich.2010) *(citing Elmore v. Mass. Higher Educ. Assistance Corp. (In re Elmore),* 230 B.R. 22, 28 (Bankr.D.Conn.1999) ("Although the minimal standard of living test does not require a debtor to live below poverty level, the analysis `begins, and ends' with a debtor's income when it is between two and three times the poverty level.")). Here, the Plaintiffs combined household income is $41,630.00. According to the Department of Health and Human Services, the federal poverty level for a family of three in the 48 contiguous states is $19,530. Thus, the Plaintiffs household AGI in 2012 was 2.13 times the federal poverty level. Although some courts have chosen to conclude the analysis at this point, given the large debt at issue and the minimal income attributed to the Plaintiff, the Court will review the Plaintiffs options.

It is undisputed that the Plaintiffs FFELP Loan is eligible for consolidation or IBR. *See* J. Stip. at 1112. As noted above, under the IBR option, the repayment period is a maximum of 25 years, after which any remaining balance is cancelled by the Secretary of Education.[8] The monthly payments each year are recalculated based upon the debtor's AGI from the previous year. In addition, under both the FFELP and the Ford Program, there is a limitation on the amount of interest that accrues and is capitalized while the student loan is being repaid under the IBR option. *See* 34 C.F.R. § 682.215(b)(4) and (5), and 34 C.F.R. § 685.221(b)(3) and (4). Based upon the Plaintiffs and his wife's 2012 jointly filed tax return, the Plaintiffs estimated IBR payment would be $154.19 per month.[9]

The Plaintiffs wife is currently contributing $162.50 per month to a voluntary 403(B) retirement plan. *See* Pl.'s Ex. 6. 341*341 The elimination of this one monthly expense alone will permit the Plaintiff to pay for his monthly payment under the IBR option and still maintain the exact same standard of living that he and his family are now maintaining. Other courts addressing voluntary contributions to retirement plans have also concluded that such expenditures are not necessary to maintain a minimal standard of living. *See, e.g.. In re Speer,* 272 B.R. 186 (Bankr.W.D.Tex. 2001)(retirement contributions are considered an unnecessary expense for undue hardship purposes); *Pobiner v. Educational Credit Mgmt. Corp. (In. re Pobiner),* 309 B.R. 405, 417 (Bankr.E.D.N.Y. 2009) (court concluded that plaintiff had not met first prong where his family expenses included items that were not necessary to a minimal standard of living, including his wife's 401(k) contributions). *Cf. In re Hester,*330 B.R. 809, 813 (Bankr. S.D.Fla.2005) (citation omitted) (when addressing claim of substantial abuse under 11 U.S.C. § 707, court held that contributions to a retirement account are not "`reasonably necessary to be expended for the maintenance or support of the debtor'"); *In re Parada,* 391 B.R. 492 (Bankr. S.D.Fla.2008) (same).

In addition, a debtor's tax refunds must also be taken into account when determining the amount of income available to repay a student loan. *See, e.g., Sturtevant V. Educ. Credit Mgmt. Cor-p. (In re Sturtevant),* Adv. No. 6:09-ap-00909-ABB, 2011 WL 1656111, at *3 (Bankr.M.D.Fla. Apr. 26, 2011) (debtor's family had $646.40 per month surplus when accounting for pro rata tax refunds); *McNemar v. Student Loan Servicing Center (In re McNemar),* 352 B.R. 621 (Bankr.N.D.W.Va.2006) (court factored into income available for payment of student loans anticipated tax refunds);*Gharam v. U.S. Dept. Educ. (In re Gharavi),* 335 B.R. 492 (Bankr.D.Mass. 2006) (in figuring amount of monthly income debtor had available, court took the average of the debtor's tax refunds over three years and then spread that amount out over twelve months). Here, the Plaintiff and his wife received federal tax refunds over the past four years ranging in amounts from $100.00 to $2,526.00, or an average of $1,224.50 per year.[10] Over a twelve month period, the Plaintiffs average annual refund provides an additional $102.00 per month of income that could be made available for student loan payments.

The final consideration is the Plaintiffs efforts to maximize his income. The Plaintiff testified that he applied for various jobs in his area of expertise, to which he has received no response or was otherwise denied. Nevertheless, in order to maximize income, a debtor must demonstrate that he is unemployable in other fields. *See* *In re Brosnan,* 323 B.R. at 538 (stating that "because Plaintiff did not demonstrate that she was unable to secure employment in other fields, the Court finds that Plaintiff has not maximized her income"). The Debtor testified that he was denied employment outside his area of expertise, specifically as a police dispatcher, but he failed to cite additional instances of efforts to seek a position outside of the scientific field. Moreover, he did not cite reasons, other than over-qualification, as to why he cannot be employed in other areas.

Because the Court concludes that the Plaintiff can maintain a minimal standard of living and still make the estimated IBR payment, the Plaintiff has failed to establish the first prong of the *Brunner* test. The Court's conclusion is in accord with the decisions of other courts in the Eleventh 342*342 Circuit when faced with similar situations. *See, e.g.,* *Stanley,* 300 B.R. at 813-819 (debtor did not meet the first prong of *Brunner* test where she could afford to make payments and still maintain a minimal standard of living); *In re Sturtevant,* 2011 WL 1656111, at *3 (court held that plaintiff did not prove the first prong where she could repay her student loan under the IBR payment and maintain a minimal standard of living); *In re Russotto,* 370 B.R. at 858(same); *Educ. Credit Mgmt. Corp. v. Boykin (In re Boykin),* 313 B.R. 516 (M.D.Ga.2004) (same).

B. There Are No Additional Circumstances Within the Purview of the *Brunner* Test Indicating that the Plaintiffs State of Affairs is Likely to Persist for a Significant Portion of the Repayment Period

In evaluating the second prong of the *Brunner* test, the Court considers any "additional circumstances" which might prevent the Plaintiff from "maintaining a minimal standard of living for a significant portion of the repayment period if he is required to repay the student loans." *In re Brosnan,* 323 B.R. at 538.[11] "The second prong is the heart of the *Brunner* test, and is often difficult to prove because it requires the debtor to show that she will be unable to pay her student loan debt in the future for reasons outside her control." *Matthews-Hamad v. Educ. Credit Mgmt. Corp. (In re Matthews-Hamad),* 377 B.R. 415, 421-22 (Bankr.M.D.Fla.2007) (*citing* *In re Johnson,* 299 B.R. 676, 680 (Bankr.M.D.Ga. 2003)). Addressing the second prong of *Brunner,* several Circuit Courts, including the Eleventh Circuit, require that a debtor show a "certainty of hopelessness" in order to meet his or her burden of proof:

Under *Brunner,* undue hardship does not exist simply because the debtor presently is unable to repay his or her student loans; the inability to pay must be "likely to continue for a significant time," ... such that there is a "certainty of hopelessness," that the debtor will be unable to repay the loans within the repayment period.

In re Mosley, 494 F.3d 1320, 1326 (11th Cir.2007) (*quoting* *In re Cox,* 338 F.3d at 1242; *In re Brightful,* 267 F.3d at 328). *See also* *In re Frushour,* 433 F.3d 393, 401 (4th Cir.2005); *In re Tirch,* 409 F.3d 677, 681 (6th Cir.2005). This factor "most clearly reflects the congressional imperative that the debtor's hardship must be more than the normal hardship that accompanies any bankruptcy." *In re Spence,* 541 F.3d 538, 544 (4th Cir.2008) (*quoting* *In re Frushour,* 433 F.3d at 401). Moreover, "[a]dditional circumstances `must be beyond the debtor's control, not borne of free choice.'" *Jones v. Bank One Texas, et al.,* 376 B.R. 130, 140 (W.D.Tex. 2007) (quotation omitted).

"The Eleventh Circuit has not provided clear guidance on applying prong two other than to embrace the `certainty of hopelessness' standard." *In re Williams,* 492 B.R. 79, 87 (Bankr.M.D.Ga.2013) (*citing* *Mosley,* 494 F.3d at 1326). Nonetheless, 343*343 it is apparent that "[t]his prong recognizes the potential continuing benefit of an education, and requires that the debtor show her grim financial condition is likely to exist for a substantial portion of the repayment period." *In re Matthews-Hamad,* 377 B.R. at 422(*citing* *In re Roberson,* 999 F.2d 1132, 1135 (7th Cir.1993)). Here, the Plaintiffs situation does not appear hopeless. The Plaintiff is a forty-sixyear-old, relatively healthy, and well-educated man. He holds several degrees, including a B.S. degree in Zoology from the University of Florida, and a Ph.D degree in Integrative Biology from Florida Atlantic University.[12] Although the Court is sympathetic to the Plaintiffs health issues — namely Attention Deficit Disorder, sleep apnea, anxiety, and depression, the Plaintiff failed to show how his medical conditions prevent him from working permanently.[13] Moreover, the Plaintiffs wife and son are also healthy, and the evidence presented at trial establishes that the Plaintiffs wife is able to, and is in fact, working full time.

The Plaintiff presented some evidence of limitations on his ability to work during the afternoon because he is the primary caregiver for his son. However, the Plaintiff testified that he will be starting a new part-time position in August 2013 at Palm Beach State College, provided that enough students enroll in the course. This position would pay him more than he was making at the time of trial. While the Plaintiff testified that the position at Palm Beach State College will only come to fruition if enough students enroll, the Plaintiff's ability to obtain new employment demonstrates that his situation is not "hopeless" because of the fact that a college is willing to offer employment. Although the Court recognizes the difficulties 344*344inherent in finding a position in academia, the Plaintiff is not precluded from finding a position in another field.[14]

In addition, the Plaintiffs financial situation will likely improve in the near future when the Plaintiffs son begins school.[15] *See Educ. Credit Mgmt. Corp. v. Beattie,* 490 B.R. 581, 589-90 (W.D.Wash.2012) (court could take judicial notice of the fact that in the United States, children are afforded free public education from the ages of approximately five to eighteen). Once the Plaintiffs son begins school, the Plaintiffs monthly day care expense of $450.00 per month will be eliminated or reduced, depending on the necessity of pre-and post-school care. *See id.; In re Pobiner,* 309 B.R. at 418 (debtor's monthly day care expenses will cease when the debtor's child begins kindergarten).

Therefore, the Plaintiff has not sustained his burden of establishing any exceptional circumstances showing a certainty of hopelessness. While the Court is sympathetic to the difficulties of the Plaintiffs present circumstances and the condition of the job market, there are no "additional circumstances," outside of the normal hardships faced by bankruptcy petitioners, which would render his situation hopeless.

C. The Plaintiff Has Not Made a Good Faith Effort to Repay the Loan Owed to the Defendant for Purposes of the *Brunner* Test

Finally, the evidence presented at trial shows that the Plaintiff has not made a good faith effort to repay the FFELP Loan owed to the Defendant. The cases make clear that good faith in repayment does not simply mean that a debtor has made payments on his student loans. Rather, the courts interpreting good faith note that a debtor must also put on evidence to prove that the debtor has made sufficient efforts to obtain employment, maximize income, and minimize expenses. *See, e.g., In re Mosley,* 494 F.3d at 1327; *In re Spence,* 541 F.3d 538, 544 (4th Cir.2008); *In re Goulet,* 284 F.3d 773, 779 (7th

Cir.2002); *In re Kidd,* 472 B.R. 857, 862 (Bankr.N.D.Ga.2012). Moreover, a debtor's efforts to take advantage of eligible repayment or restructuring options that make the debt less onerous, including those afforded by the Ford Program and IBR options, are a component of the good faith inquiry. *See, e.g., In re Mosley,* 494 F.3d at 1327, *In re Russotto,* 370 B.R. at 859; *In re Sturtevant,* 2011 WL 1656111, at *4; *In re Brosnan,* 323 B.R. 533, 538-39 (Bankr.M.D.Fla.2005); *In re Frushour,* 433 F.3d at 402; *In re Tirch,* 409 F.3d at 682-83; *In re Alderete,* 412 F.3d 1200, 1206 (10th Cir.2005); *In re Pobiner,* 309 B.R. at 421 ("Good faith is also measured by a debtor's effort, or lack thereof, to negotiate an alternative repayment plan.").

The Plaintiff presented only minimal evidence regarding his good faith. As for actual payments, the parties stipulated that between August 2, 2002, the date the FFELP Loan was issued, and April 25, 2013, the Plaintiff made payments totaling only $452.55. Nonetheless, the Plaintiff testified at trial that he has made payments on a different student loan that is 345*345 not the subject of this adversary proceeding. Although the reason for this is unclear, it tends to show a lack of good faith on the Plaintiffs part.[16]

The Plaintiff also testified that he obtained deferments and forbearances on the FFELP Loan. Obtaining deferments, however, does not demonstrate good faith when a deferment is not followed by payment or significant efforts to work out a reasonable repayment schedule. *See Educ. Credit Mgmt. Corp. v. Mosko (In re Mosko),* 515 F.3d 319, 327 (4th Cir.2008) ("without reasonable efforts to make subsequent payments, requesting deferments and forbearances alone does not establish good faith"). The Plaintiff did not present evidence of any efforts to make payments after having received deferments, and as discussed further below, he rejected the available IBR option.

In addition, the evidence does not support a determination that the Plaintiff has made a good faith effort to maximize income and minimize expenses. The continued contribution by the Plaintiffs wife to a voluntary 403(B) plan is not indicative of sufficient efforts to minimize expenses for purposes of the *Brunner* test. *See, e.g.,Shirzadi v. U.S.A. Grp. Loan Servs. (In re Shirzadi),* 269 B.R. 664 (Bankr.S.D.Ind. 2001) (the court held that 44 year old debtor did not prove good faith effort to minimize her expenses where she contributed a biweekly total of $200.00 to a retirement account and education fund for her children); *Educ. Credit Mgmt. Corp. v. Young,* 376 B.R. 795, 800 (E.D.Tex.2007) (debtor failed to prove the third prong where she made monthly 401(k) contribution of $220.00); *In re Pobiner,* 309 B.R. at 420-21 (debtor failed to prove the third prong where, *inter alia,* debtor continued to make contributions to 401(k) plan). Further, even though the Plaintiff received a number of federal tax refunds over the years, there was no evidence presented to show that any of those refunds were used toward payment of the student loan debt owed to the Defendant. *See Wolph v. U.S. Dep't of Educ. (In re Wolph),* 479 B.R. 725, 731 (Bankr.N.D.Ohio 2012) (court concluded that debtor did not show good faith effort to repay where she "did not utilize any of [her tax refunds] toward repayment of her student loan obligations.").

As noted above, the Plaintiff did present some evidence of recent efforts to obtain employment positions in the scientific field. However, the only concrete example given of any effort to locate employment outside his chosen field was his submission of an application for a police dispatcher position. *See In re Brosnan,* 323 B.R. at 537(court held that debtor, a lawyer, did not maximize her income where she did not demonstrate that she was unable to secure employment in other fields). Further, while the Plaintiff testified that he is the primary caregiver for his son, there was no evidence presented as to why the Plaintiff could not otherwise work during the day when his son is in day care.

Finally, the Plaintiffs refusal to take advantage of the IBR option is further evidence of his lack of good faith. "A debtor's effort to seek out options to make the student loan debt less burdensome is an important component of the good-faith inquiry." *In re Mattheivs-Hamad,* 377 B.R. at 423 (*citing* *Frushour,* 433 F.3d at 402) (citation omitted). "Although not dispositive, it shows that the debtor takes her loan obligations seriously and is trying to 346*346 repay them despite her unfortunate circumstances." *Id. (citing* *In re Tirch,* 409 F.3d at 682-83 (citation omitted)). Here, it is undisputed that the Plaintiff was made aware of the Ford Program and the availability of IBR. It is also undisputed that the Plaintiff refused to take advantage of the IBR option even though it would provide for a greatly reduced monthly student loan payment.[17]

Here, the Plaintiff failed to provide a legitimate basis for his refusal to take advantage of the Ford Program or the IBR option. At trial, the Plaintiff testified that his reason for rejecting IBR as an option was his belief that he would have a huge tax liability in 25 years for debt forgiveness income. The vast majority of courts that have addressed this issue have concluded that it is speculative, at best, to guess what the tax laws will be in 25 years. *See, e.g.,* *ECMC v. Stanley,* 300 B.R. at 818 n. 8 ("Forecasting such a tax liability under whatever tax laws will be in effect in 25 years would be sheer speculation."); *In re Archibald,* 280 B.R. 222 (Bankr.S.D.Ind. 2002) (tax implications of debt forgiveness of debt are speculative at best); *Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane),* 287 B.R. 490, 500 n. 7 (9th Cir. BAP 2002) (same, citing *Archibald* and noting that while a tax burden was not unlikely, the availability of IBR should still be considered); *Burton v. Educ. Credit Mgmt. Corp. (In re Burton),* 339 B.R. 856, 889 (Bankr.E.D.Va.2006) (analysis of potential tax liability in 25 years would be speculative); *Educ. Credit Mgmt. Corp. v. Rhodes,* 464 B.R. 918, 926 (W.D.Wash. 2012) (tax implications at end of IBR period are speculative).

Moreover, even under existing tax laws, a taxpayer only has tax liability for debt forgiveness if he is solvent,[18] in essence, if the amount of his assets exceed the amount of liabilities, including the debt that is being cancelled. *See* 26 U.S.C. § 108(a)(1)(B) and § 108(d)(3); *Educ. Credit Mgmt. Corp. v. Jesperson,* 571 F.3d 775, 782 (8th Cir.2009); *Educ. Credit Mgmt. Corp. v. Bronsdon,* 421 B.R. 27, 35 (D.Mass.2009). Here, the purported amount of the Plaintiffs student loan debt owed to the Defendant was $135,115.91 as of April 16, 2013, with interest continuing to accrue at the rate of $18.97 per diem. The amount of this student loan would be included in any calculation of the Plaintiffs solvency, and the Plaintiff did not put on any evidence to show that his assets, even at the time of trial, exceed his liabilities.[19] *See* *Rhodes,* 464 B.R. at 926 ("But [the Debtor] did not submit evidence that he would incur such tax liability, despite the fact that he bore the burden of doing so, and the Ninth Circuit Bankruptcy Appellate Panel has discouraged speculation over the tax implications of participation in income-based repayment plans.").

Therefore, the Court concludes that the Plaintiff did not prove that he has made a "good faith effort" to repay the student loan he owes to the Defendant, and, as 347*347such, did not meet the third prong of the *Brunner* test.

III. *Conclusion*

For the reasons discussed above, the Court finds that the debt owed to the Defendant is nondischargeable pursuant to § 523(a)(8).

ORDER

The Court, being fully advised in the premises, hereby ORDERS AND ADJUDGES that:

1. The student loan debt owed by the Plaintiff to the Defendant for the FFELP Loan is NONDISCHARGEABLE pursuant to 11 U.S.C. § 523(a)(8).

2. The Court shall enter a Final Judgment contemporaneously herewith.

3. After entry of the Final Judgment, the Clerk is hereby directed to close the case.

[1] On June 13, 2013. following trial, the Plaintiff submitted his *Proposed Findings of Fact* (ECF No. 45) (the "Plaintiffs Proposed Findings of Fact"). On June 14, 2013, the Defendant submitted its (*Proposed) Findings of Fact and Conclusions of Law* (the "Defendant's Proposed Findings of Fact") by email to the Court and to the Plaintiff.

[2] The Defendant is the current holder of the consolidated FFELP Loan that was made to the Plaintiff under a Federal Consolidation Loan Application and Promissory Note dated August 2, 2002. J. Stip. at ¶ 8.

[3] Information on the programs can be found at 34 C.F.R. Part 685 *et seq., Id.*

[4] In addition to being eligible for IBR, the Plaintiff is also eligible for several fixed amortized payment options, which would provide for full repayment of the Plaintiffs debt. J. Stip. at ¶ 16. Based upon the alleged $135,115.92 balance owed as of April 16, 2013, the estimated amount of the Plaintiffs monthly payments under these options, assuming an interest rate of 5.25%, would be as follows: (a) Under the standard plan, $746.12 per month for 360 months; or (b) Under the graduated plan, $591.13 per month for first two years, with an increase in the monthly payment amount every two years for a period of 360 months. *Id.*

[5] The Plaintiff did not submit expert testimony or elaborate on the effect of such diseases on his ability to work. Further, he indicated that he is being treated for his conditions.

[6] As the Eleventh Circuit reasoned:

The government is not twisting the arms of potential students. The decision of whether or not to borrow for a college education lies with the individual; absent an expression to the contrary, the government does not guarantee the student's future financial success. If the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow.'

In re Cox, 338 F.3d at 1242 (*quoting* *In re Roberson,* 999 F.2d 1132, 1137 (7th Cir. 1993)).

[7] Nevertheless, "[s]ome courts have suggested, in a context where debtor and spouse each have income, that consideration of the entirety of the non-debtor spouse's income in the measure of the first*Brunner* prong is inappropriate." *In re Murphy,* 305 B.R. 780, 795 n. 18 (Bankr.E.D.Va.2004) (*citing* *Innes v. Kansas (In re Innes),* 284 B.R. 496, 508 (D.Kan.2002) (bankruptcy court correctly considered all of non-debtor spouse's income and applied the proportionate share of her income to the family's essential living expenses for "[t]o require her to do more would essentially force [the non-debtor spouse] or her children to pay debts for which she is not liable and support [the debtor] while being denied the right to

apply some of her income to reasonably non-luxury items.")) However, here, it is clear that the Plaintiff and his wife have made choices and sacrifices to care for their son. The Plaintiff contributes substantially to the family by serving as his child's primary caretaker. As such, his wife's income should be considered when determining their expenses, contributions, and quality of life. *See* *In re Murphy,* 305 B.R. at 795 n. 18 (court properly took into account debtor's non-debtor spouse's income when considering the first prong of the Brunner test "it appears fundamentally unfair to theoretically assume [the debtor] has no income yet has the substantial monthly living expenses scheduled by her"). Moreover, the Plaintiff did not provide evidence to suggest that his family was not functioning as a combined economic unit. *See id.* ("If a debtor is able to forgo outside employment and income and devote his or her full energies to child rearing, not to consider her spouse's income in calculation of whether the student loans may be repaid while maintaining a minimal lifestyle appears to be as artificial and inappropriate as assuming a family does not function as a combined economic unit."). Although the Court notes that the Plaintiff has not devoted all of his time to caring for his son, his testimony made clear that he has made sacrifices in terms of scheduling work to be with his son. *See* *In re Davis.* 373 B.R. 241, 248 (W.D.N.Y.2007) (citation omitted) ("*Brunner* does not specifically require that total household income be utilized in considering this element, rather it simply states that the standard of living should be evaluated `based on current income and expenses.' However, well established case law makes it clear that total household income, including that of a non-debtor spouse, live-in companion, life partner and contributing co-habitant, must be considered in conducting this minimal standard of living analysis, as well as its relevance in generally determining undue hardship under the Bankruptcy Code.") *See also* *In re White,* 243 B.R. at 507-512 (court found "as a matter of law that [the non-debtor's spouse's] income should be considered in deciding whether [debtor] is able to pay his student loans and maintain a minimal lifestyle").

[8] As described above, the monthly payments are equal to 15% of the difference between the Plaintiffs AGI and 150% of the HHS Poverty Guidelines, which are published by the U.S. Department of Health & Human Services, divided by twelve.

[9] The Court notes that if Plaintiff was to file his own separate tax return, *i.e.* married but filing separately, the Plaintiffs estimated IBR payment would be zero based upon Plaintiff's individual income in 2012. *See* BCMC Ex. D. Under this scenario, the Plaintiff would still be considered current on his student loan. *See* 34 C.F.R. § 685.221(a), and 34 C.F.R. § 682.215(a).

[10] The average is even higher if only the refunds received in 2011 ($896.00) and 2012 ($2,526.00) are used: average of $1,711 per year or $142.58 per month.

[11] The second prong of *Brunner* is focused on the long-term outlook of a debtor's particular situation, and in particular, whether the circumstances are such that they will last for a significant portion of the repayment period. Here, in light of the availability of IBR as a means of repaying the FFELP Loan, that period is 25 years. The Court has already concluded that Plaintiff can maintain a minimal standard of living and remain current on his student loan payment under the IBR option. For that reason, even if the present circumstances were to continue for a significant portion of the repayment period, barring additional factors, the Plaintiff could still repay his student loan. Thus, for that reason, the second prong has not been met. *See* *In re Russotto,* 370 B.R. at 858.

[12] As noted by the Bankruptcy Court for the Middle District of Florida, "in evaluating whether there is a certainty of hopelessness or merely a temporary dire financial condition, the Court must keep in mind the important policy reasons for ensuring the success of government-sponsored student loan

programs." *In re Matthews-Hamad,* 377 B.R. at 422. "Recognizing the value of education in the pursuit of equal opportunities, `Congress made student loans available to those who otherwise may not have been able to receive adequate financing of a college education from private lenders.'" *Id. (quoting In re Roberson,* 999 F.2d at 1135).

[13] "Only a debtor with rare circumstances will satisfy this prong of *Brunner." In re Matthews-Hamad,*377 B.R. at 422 (*citing Frushour,* 433 F.3d at 401). "A debtor might satisfy this prong if []he can establish that []he is ill, disabled, lacking usable job skills, or responsible for a large number of dependents." *Id. (citing Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler),* 397 F.3d 382, 386 (6th Cir.2005)). Here, "[i]n order to prove the extraordinary circumstances necessary to meet prong two of the *Brunner* test. Plaintiff must present evidence which corroborates h[is] own testimony regarding h[is] medical difficulties." *In re Brosnan,* 323 B.R. 533, 538 (Bankr.M.D.Fla.2005) (*citing Folsom,* 315 B.R. at 165 (citations omitted)). "Although evidence need not consist of extensive expert testimony, it must corroborate the allegations testified to by the debtor. The Court has previously found that a debtor's testimony alone cannot establish prong two of the *Brunner* test if the debtor's health is at issue." *Id.* The Plaintiff provided testimony and responded to the Defendant's interrogatory asserting his disabilities. Def.'s Ex. B, Resp. to Interrog. 9. *See Swinney v. Academic Fin. Servs. (In re Swinney),*266 B.R. 800, 805 (Bankr. N.D.Ohio 2001) ("Although such [corroborating] evidence does not have to necessarily consist of extensive expert testimony, such evidence should consist of more than simply bare allegations; that is, whenever a debtor's health, whether mental or physical, is directly put at issue some corroborating evidence must be given supporting the proponent's position.... For example, if properly authenticated, letters from a treating physician could be utilized."). Here, the crucial requirement is that the Plaintiff must show that his medical conditions prevent him from working, which he failed to do.

[14] Although the Plaintiff gave an example of being "over-qualified" for the dispatcher position, the Plaintiff did not provide sufficient testimony suggesting that all fields are precluded because of his educational background. Thus, the Plaintiff is not without options because he is not permanently disabled or otherwise fully precluded from working.

[15] There was no testimony presented to suggest that the Plaintiff's son would be unable to attend school.

[16] As noted by one court, paying "one of her educational debts, while seeking to discharge all of her remaining educational obligations, does not square with the good faith prong of the *Brunner* test."*Wolph v. U.S. Dep't of Educ. (In re Wolph),* 479 B.R. 725, 732 (Bankr.N.D.Ohio 2012).

[17] Furthermore, the required payment would be $0 per month if the Plaintiff files his tax return separately from his wife — provided that his income remains the same.

[18] "For the `purposes of [section 108], the term "insolvent" means the excess of liabilities over the fair market value of assets' at the time immediately before the discharge of the debt." *Educ. Credit Mgmt. Corp. v. Bronsdon,* 421 B.R. 27, 35 (D.Mass.2009) (*citing* 26 U.S.C. § 108(d)(3); *Merkel v. Comm'r of Internal Revenue,* 192 F.3d 844 n. 3 (9th Cir. 1999) (applying definition)).

[19] It is highly unlikely that Plaintiff is solvent today from a balance sheet perspective since the evidence at trial was that he and his wife do not own a home, but rather rent, and their two cars are 6 and 12-years-old.

In re Williams, Williams v. Sallie Mae et al.

In re: Cheri Brandy Williams, Debtor.
Cheri Brandy Williams, Plaintiff,
v.
U.S. Department of Education; Sallie Mae Servicing Corp.; The University of Alabama; KHEAA, Defendants.

Case No.: 09-70764-BGC-7, A. P. No.: 09-70036.

United States Bankruptcy Court, N.D. Alabama, Southern Division.

September 1, 2011.

MEMORANDUM OPINION

BENJAMIN COHEN, Bankruptcy Judge.

The matters before the Court are:

1. KHEAA's Amended Motion for Summary Judgment filed on January 25, 2011 (Docket No. 34); and

2. The Amended Motion for Summary Judgment Filed by the Board of Trustees of the University of Alabama filed on January 26, 2011 (Docket No. 37).

After notice, a hearing was held on March 9, 2011. Appearing were Eric Wilson, the attorney for the debtor; McCollum Halcomb, the attorney for KHEAA; and Norma Mungenast Lemley, the attorney for The University of Alabama.

I. The Parties' Positions

A. The Debtor

The debtor seeks an undue hardship discharge of student loans she owes The University of Alabama and the Kentucky Higher Education Assistance Authority (KHEAA). The debtor suffers from severe mania and bipolar disorder, which was exacerbated by a physical attack in December 2008. At the time of the hearing, there were plans for her to be admitted to a hospital for treatment. The Court learned later that she was admitted, treated, and released. The debtor believes that her problems caused by her mental condition will allow her to satisfy the required criteria for an undue hardship discharge.

B. The Creditors

Both creditors contend that the debtor cannot satisfy the requirements for an undue hardship discharge.

II. Issues

A student loan debt is not dischargeable in bankruptcy unless, "excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). Consequently, in proceedings to determine the dischargeability of a student loan, there are two issues: (1) is there a debt; and (2) if there is, would paying that debt impose an undue hardship on the debtor and the debtor's dependents.

III. Legal Standards

A. Section 523(a)(8)

Section 523(a)(8) of the Bankruptcy Code reads:

> (a) A discharge under section 727 ... [of the Bankruptcy Code] does not discharge an individual debtor from any debt—
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;
>
> 11 U.S.C. § 523.

B. Burdens of Proof

1. Proving a Debt

The creditor opposing dischargeability of a student loan debt has the initial burden of proving the existence of the debt. The creditor must prove that there is a debt and that the debt is for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution. If the creditor meets that burden, the burden shifts to the debtor to prove undue hardship.

Each creditor here has proved that the debtor has an unpaid, government funded, student loan. Therefore, each has satisfied its burden under this provision. Consequently the burden shifts to the debtor to prove undue hardship.

2. **Proving Undue Hardship**

The debtor has the burden of proving "undue hardship." In Hemar Ins. Corp. of America v. Cox (In re Cox), 338 F.3d 1238 (11th Cir.2003), reh'g denied and reh'g en banc denied, 82 Fed.Appx. 220 (11th Cir.2003), cert. denied, 541 U.S. 991, 124 S.Ct. 2016, 158 L.Ed.2d 496 (2004), the Court of Appeals for the Eleventh Circuit adopted the three-part test originated by the Court of Appeals for the Second Circuit in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2nd Cir.1987), as this Circuit's test for proving "undue hardship." The per curiam opinion of the Eleventh Circuit court stated:

[to establish "undue hardship," the debtor must show] (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Id. at 1241 (quoting Brunner v. New York State Higher Education Services Corp., 831 F.2d 395, 396 (2nd Cir.1987)).

All the courts applying the Brunner test recognize that to qualify for an undue hardship discharge of a student loan, the debtor must satisfy all three parts of the test.

C. This Court Prior Opinions

The Court has had several occasions to consider nondischargeability of student loans. In re Rutherford, 317 B.R. 865 (Bankr. N.D. Ala. 2004); In re Ivory, 269 B.R. 890 (Bankr. N.D. Ala. 2001); In re White, 243 B.R. 498 (Bankr. N.D. Ala. 1999); In re O'Flaherty, 204 B.R. 793 (Bankr. N.D. Ala. 1997): In re Halverson, 189 B.R. 840 (Bankr. N.D. Ala. 1995). The law in those cases is still applicable today, and the Court relies on those decisions in support of the holdings in the instant proceeding.

D. Summary Judgment Standards

The standards for resolving summary judgment motions are outlined in the Eleventh Circuit Court of Appeals decision in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993). This Court applied those standards in this matter.

IV. Findings of Fact

This Court's findings of fact are limited. As stated above, before a debtor may qualify for an undue hardship discharge of a student loan, the debtor must satisfy all three parts of the Brunner test. The facts here indicate that the debtor cannot satisfy the first factor, that is she cannot prove, based on current income and expenses, that she cannot maintain a "minimal" standard of living if forced to repay the loans.

A. The Debtor's Loans

In regard to KHEAA, the parties stipulated to certain facts. Those are:

The debtor signed a student loan consolidation note on June 1, 2005. KHEAA is the guarantor and current holder of the note. The amount disbursed pursuant to that note was $32,149.00. The debtor received deferment forbearances on the consolidation loan. The note was in a deferment status for 39 months. The debtor made four payments on the student loan totaling $599.44. At the time this case was filed, the debtor owed $36,079.89. This amount has increased because interest continues to accrue on the loan. The consolidation loan is the type of loan contemplated under 11 U.S.C. § 523(a)(8).

Stipulations of Fact, Docket No. 25 at 9, October 12, 2010.

At the hearing, counsel for the University of Alabama summarized similar facts for her client's claim. Those are:

No debate about that we qualified as a government loan under 523(a)(8), that we had two $2,000 loans that she took out two summers while she was in school. Her payment plan was $75.00 monthly for 61 months beginning in April 2005. She received a 13-month forbearance from April 2005 to 2006. She received an economic hardship deferment from July 2005 to September 2005. Between June 2006 to June 2008, the debtor made payments. Prior to the bankruptcy filing she lapsed into failure to pay. The University sent several notices. At the time she filed bankruptcy she had paid $2,620.77. At that point she owed $2,099.21. That amount does not include any interest during the pendency of the bankruptcy.

Unofficial Transcript from Hearing on March 9, 2011.

B. The Debtor's Income and Expenses

At that same hearing, counsel for KHEAA summarized the facts his client contends relates to issues of the debtor's income and expenses. Those are:

According to the information she provided in her response to MSJ, she has a job and is earning $17.50 per hour, constituting annual income of $36,400.00. She has also received bonuses for not missing work and being at work timely. She has a good job and is apparently a good worker in that position. The poverty guideline at the time the adversary proceeding was filed was $10,830.00 for a single person. It has been increased by Health and Human Services to $10,890.00. Her income is 334% of the federal poverty guidelines. Common sense mandates that someone who is earning 3 1/3 times the federal poverty guidelines has income that is beyond a minimal standard of living.

KHEAA believes her income is sufficient, but that the debtor should minimize her expenses. When the case was filed, the debtor had no rent expense. Sometime after the filing, she moved into an apartment and incurs $670.00 monthly in rental expense. Food expense of $600.00 monthly is extraordinary. In her response to the motion for summary judgment, the debtor has reduced her food expense to $360.00 per month. The USDA provides food plans based on the age of the debtor, the gender of the debtor, family size, etc. Even the reduction to $360 is $60 more than the liberal food budget for a single female. Under a minimal standard of living, a liberal food spending allowance is not in keeping with a minimal standard of living. The thrifty to moderate, somewhere between $140 and $300 monthly should be the allowance under a minimal standard of living.

Income she stated in her amendments to Schedules I and J indicate a net monthly pay of $2,319.78, but it does not have a provision for any of the bonuses she has received in the past. $670.00 seems high for a single person apartment in Tuscaloosa.

Unofficial Transcript of Hearing March 9, 2011.

Counsel for The University of Alabama added this information:

When looking at income versus expenses and thinking about what is ahead for her, she did have an opportunity to reaffirm her debt with her car. She has a $108 car payment that will go away in 2 years. The debtor may have to find a roommate, in Tuscaloosa there is plenty of opportunity to do that. Knowing her car debt is going to be paid in two years. Also she has a pattern of steadily increasing her income. The stipulations point out that her income goes up each year.

Unofficial Transcript of Hearing March 9, 2011.

Counsel for the debtor responded:

When the debtor filed her bankruptcy petition, she was living with her sister and had no rental expense, but there were larger food and utility expenses to compensate her sister for not having to pay rent. That situation deteriorated in large part because of her problems and she had to find a place to live. That is why she has a rental expense and she rents through the company for which she works. The food expense now verses then is $360.00 which is less than $90 per week. Her vehicle expense when she filed was $180 per month. When she reaffirmed with Wells Fargo they dropped the payment to $108.00 per month. She minimized the expense through negotiation with Wells Fargo. Those two are major differences. Her medical expenses increased from $430 to $540 per month through no fault of her own. She has decreased her auto insurance debt, but she has picked up a renter's insurance payment.

Unofficial Transcript of Hearing March 9, 2011.

C. The Debtor's Employment

The debtor's ability to earn a living was discussed at the March 9, 2011, hearing. Counsel for the University represented:

Ms. Williams has a degree, a high GPA, seven years of straight employment, extra bonuses for coming to work on time. She may not be employed to the extent that she would like to be and she may be having some problems, but she has been managing them with her current employer.

In response to questions from the Court, counsel for the debtor explained that the debtor has worked for the same company for seven years. The company manages real estate and apartments in Tuscaloosa, Alabama. The debtor lives in one of the apartments the company manages. It appears to the Court that the debtor's living and working situation in this regard is stable.[1]

D. The Debtor's Medical Problems

Counsel for the debtor represented:

I think it would be disingenuous for the plaintiff to argue that KHEAA and The University don't have a strong case under the Brunner case as the facts are presently. However, the situation with Ms. Williams hinges on her health and it being a fluid situation. It has been to her benefit that the litigation has gone on this long. Her medical problems have worsened, her medical expenses increased, and there is a likelihood that she will be committed by Dr. Bruce Adkins to a mental hospital in the next couple of weeks. She suffers from severe mania and bipolar disorder which was exacerbated by a physical attack in December 2008. Our petition shows a potential cause of action as it relates to that attack, but I do not know enough of the details to inform the court as to where that litigation is. That medical situation could be a domino effect on the other factors. How long is she going to be committed? Is she still going to be able to keep her present employment? She could be in a situation where her income could be greatly reduced. Are we there now? No sir.

Unofficial Transcript of Hearing March 9, 2011.

At the March 9 hearing, the Court and the parties discussed what impact there could be if the debtor were actually admitted for treatment. Counsel for the debtor suggested that if that occurred, summary judgment should be denied. Counsel for The University and KHEAA pointed out that if the debtor became disabled after the hearing that there were procedures in place to have payment of the loans placed in deferment or in a forbearance status.

This final matter was the subject of an email sent to the Court after the March 9 hearing from counsel for KHEAA, with the consent of counsel for the debtor. The email reads, "Please let Judge Cohen know that Ms. Williams did receive treatment at a healthcare facility for her health issues but has returned to work with the same employer." Email from KHEAA Counsel to Court Personnel, April 26, 2011.[2]

V. Conclusions of Law

The issue before the Court then becomes, what is a "minimum standard of living" and can the debtor maintain that standard if she is required to pay her student loans.

As this Court has discussed in prior opinions, for convenience some courts recognize the United States Department of Health and Human Services Poverty Guidelines as the level of a "minimum standard of living" and recognize an annual income above or below that as exceeding or falling below the "minimum standard of living." This Court disagrees as it cannot accept that a standard of living in poverty is an acceptable standard of living, below which there are levels of less comfort. But a "minimum standard of living" can be defined in other ways, which this Court discussed in detail in Rutherford, Ivory, and White. Those discussions included:

This Court believes that a minimal standard of living is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities. In Ivory v. United States (In re Ivory), 269 B.R. 890 (Bankr. N.D. Ala.2001), this Court listed the items it believes are necessary to maintain that standard of living. This Court wrote:

This Court believes that a minimal standard of living in modern American society includes these elements:

A. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.

B. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.

C. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.

Q. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.

R. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.

S. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

In re Rutherford, 317 B.R. 865, 877-78 (Bankr. N.D. Ala. 2004).

VI. Conclusions

The facts demonstrate that the debtor is financially able to maintain a "minimum standard of living" as that term is defined above.[3] As of the date of the hearing, the debtor was working at a job she has held for seven years. She is paid well and is meeting her expenses. Unless her situation has changed, she has housing and is able to meet her expenses. There is no indication that she would not be able to make payments on her student loan. In contrast, her counsel argues that her medical problems may prevent her from carrying on as she has in the past. The suggestion was that if those conditions worsened, the debtor may not be able to maintain the same life style. Given the debtor's medical history, those are genuine concerns. In contrast, as the email received by the Court demonstrates, for now, those concerns have not materialized. The debtor received treatment for her problems and is back at work.

The Court, and certainly opposing parties, are sympathetic to the debtor's situation. Her problems are, like many who seek the discharge of student loans, severe. In contrast, the law, as recognized by many who have analyzed it, is very strict. The burden on a debtor is difficult. Proving "undue hardship" is difficult. In this proceeding, this Court must find that the debtor did not meet that proof. Because she did not meet the first prong of the Brunner test, her debts to these creditors cannot be discharged. Because the debtor cannot prove that her student loan debts should be discharged, under the standards required in Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993), the movants are entitled to summary judgment.

A separate order will be entered contemporaneously with this Memorandum Opinion.

[1] If the debtor's circumstances were impacted in any way by the April 27, 2001, tornado in Tuscaloosa, Alabama, the parties shall advise the Court immediately.

[2] Note that this email was sent one day before the Tuscaloosa tornado.

[3] Because the subjective evidence is so strong, it is not necessary for the Court to apply an objective analysis to the debtor's income and expenses as it has in other cases.

In re Ivory, 269 BR 890 - Bankr. Court, ND Alabama 2001

269 B.R. 890 (2001)

In re Tiffany IVORY, Debtor.
Tiffany Ivory, Plaintiff,
v.
United States of America, United States Department of Education, Defendants.

Bankruptcy No. 99-05996-BGC-7. Adversary No. 00-00014.

United States Bankruptcy Court, N.D. Alabama, Southern Division.

October 29, 2001.

891*891 892*892 Kenneth J. Lay, Birmingham, AL, for the plaintiff-debtor.

Leon F. Kelly, Assistant United States Attorney, Birmingham, AL, for defendant.

MEMORANDUM OPINION ON COMPLAINT TO DISCHARGE STUDENT LOAN

BENJAMIN COHEN, Bankruptcy Judge.

I. Background

The debtor borrowed $2,500 in 1985 to attend a vocational school. She has not paid that loan and seeks to discharge it in the pending Chapter 7 case. Pursuant to section 523(a)(8) of the Bankruptcy Code, her loan is not dischargeable unless she can prove that paying the debt will impose an undue hardship on her and her dependents.[1]

The specific matter before the Court is the debtor's Complaint to Discharge Student893*893 Loan filed on January 18, 2000. A trial was held on May 15, 2001. The debtor and her attorney Kenneth J. Lay appeared, along with Leon F. Kelly, Assistant United States Attorney, for the defendants. The matter was submitted on the debtor's testimony, exhibits, stipulations, arguments, briefs, and the Court's records. With the defendants' consent, the debtor filed an affidavit on August 29, 2001, supplementing the trial record.

II. Issues

A student loan debt is not dischargeable in bankruptcy unless, "excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). Consequently, in proceedings to determine the dischargeability of a student loan, there are two issues: (1) is there a debt; and (2) if there is, would paying that debt impose an undue hardship on the debtor and the debtor's dependents.

III. Legal Standards

A. Burdens of Proof

The creditor opposing dischargeability of a student loan debt has the initial burden of proving the existence of the debt. The creditor must prove that there is a debt and that the debt is for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution. If the creditor meets that burden, the burden shifts to the debtor to prove undue hardship.

In this case, because Ms. Ivory stipulated that she owes a student loan debt to the United States Department of Education (USDE), the defendants satisfied their burden.[2] Therefore at trial, the burden shifted to the debtor to prove that paying the debt would impose an undue hardship on her and her dependents.

B. Undue Hardship

To determine whether payment of a student loan will impose an undue hardship on a debtor, this Court has adopted the three-part test from Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2nd Cir.1987). See Halverson v. Pennsylvania Higher Education Assistance Agency (In re Halverson), 189 B.R. 840, 844 (Bankr.N.D.Ala.1995); O'Flaherty v. Nellie Mae, Inc. (In re O'Flaherty), 204 B.R. 793, 796 (Bankr.N.D.Ala.1997); and In re White, 243 B.R. 498, 507 (Bankr. N.D.Ala.1999) reh'g denied 243 B.R. 515 (Bankr.N.D.Ala.1999).[3]

Under Brunner, the debtor must prove: (1) that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loan; (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 loan; and, (3) that she has made a good faith effort to repay the loan.

IV. Findings of Fact

Ms. Ivory filed the pending Chapter 7 case on October 13, 1999. She filed the pending complaint on January 19, 2000.

894*894 A. Student Loan

Ms. Ivory received a $2,500 student loan in 1985 when she was 18 years old; she is now 34. With her student loan, Ms. Ivory enrolled in Barclay College to become a legal assistant. After attending the school for about three months, she took a leave of absence. According to Ms. Ivory, during that absence the school lost its accreditation and closed.[4] Ms. Ivory did not complete her course of study anywhere else and has never worked as a legal assistant.

The USDE filed a claim in this case for $2,565.24 on May 9, 2000. It has been paid $767.96. And notwithstanding her complaint to determine dischargeability, Ms. Ivory did stipulate that she still owes a balance of $1,797.28.

B. Her Children

Ms. Ivory is a single mother supporting a 15 year old son and twin, eight year old boys. Ms. Ivory testified that the older boy's father is, or was, in prison serving a seven-year sentence for violence committed against Ms. Ivory. She thinks the twins' father is in Sacramento, California.

1. Child Support

Ms. Ivory does not receive child support from her children's fathers.[5] She has attempted to collect child support from both fathers but has not been successful.[6]She has applied for assistance from the Alabama Department of Human Resources, but as of the time of trial, she had not been contacted. She has discussed the matter with several private attorneys but explained that she cannot afford the about eleven hundred to fifteen hundred dollar retainer each requested or the hourly fees quoted. Ms. Ivory testified, "And if I had that money, I really don't think I would need child support." Transcript at 13.

2. The Children's Health Problems

All three children have health problems. The older son has had behavioral problems since he was about four or five. Ms. Ivory testified that this son's father was an extremely violent person and she attributes this child's problems to the turbulent domestic situation caused by that violence.

The twins were born three and a half months premature and weighed two pounds, three and a half ounces. Both have multiple health problems. Both have chronic reflux, asthma, and each uses a breathing machine. Their intestines were not fully developed at birth resulting in the intestinal reflux. They have heart problems, caused, according to Ms. Ivory, from the administration of an improper medication given for the intestinal reflux. They take medications daily and because of their breathing problems, receive daily "nebulizer treatments." Transcript at 22.

Because of their medical conditions, the twins receive a total of $960 per month in social security disability benefits.

895*895 3. The Children's Education

Ms. Ivory's oldest son attends public school.

The twins attend Our Lady of Fatima, a private school. Half of their tuition is paid through the Alabama Scholarship Fund, a state supported assistance program designed for low income families. Ms. Ivory attempts to pay the other half, and the twins' after school daycare, from the twins' social security benefits.[7]

Attendance at a private school provides the twins with incalculable benefits. Because of their medical problems, the twins are considered special needs children at school. According to Ms. Ivory, that recognition entitles them to assistance that would not be provided by a public school. For example, because the twins' "nebulizer treatments" and medications must be administered while the twins are at school, placement in a private school allows for assistance with these tasks. In contrast, according to Ms. Ivory, the public schools require a parent or grandparent to come to the school to administer such treatments and medication. She testified that neither she nor her mother could do that on a daily basis.

Unfortunately, Ms. Ivory is in arrears on the twins' tuition payments. Consequently, the twins are in jeopardy of losing their scholarships. If they do, they (and Ms. Ivory), will lose the benefits described above.

C. Ms. Ivory's Health Problems

Ms. Ivory also has medical problems, some similar to her twins'. Ms. Ivory has asthma and systemic lupus.

Ms. Ivory's breathing problems began when she was about fourteen. When she was pregnant with the twins, those problems became acute. She took prescribed medication, but the problems worsened. Ms. Ivory became more ill. While in the hospital, she saw a television commercial about the medication she was taking. She discussed the medication with her doctor, who determined that it indeed attributed to her breathing problems. According to Ms. Ivory, the medication may have been defective and may have caused some deaths.

Ms. Ivory discontinued the medication, but her lungs had already been damaged. About three months before the twins were due, Ms. Ivory had a severe asthma attack. That attack attributed to the twins' premature birth.

While the twins were in intensive care, they received the same breathing medication. Ms. Ivory eventually became a plaintiff in a class action against the medication's manufacturer. After an out-of-court settlement, Ms. Ivory received remuneration for herself and the twins. Her portion of the settlement was paid to the Chapter 7 trustee in this case. The trustee distributed those funds to unsecured creditors, including the USDE which received $767.96 on its $2,565.24 claim. The twins received their full settlement.

D. Public Assistance

Ms. Ivory previously received social security disability benefits because of her own medical problems. However, because those payments were not sufficient and because she wanted to work, Ms. Ivory sought employment. When she found a job, she gave up the assistance. She explained, "Yeah, because I decided that I am only thirty-four years old and I don't 896*896 want to sit on my butt all through my life, you know. Five hundred dollars a month is not anything." Transcript at 36.

Ms. Ivory is working now despite her health problems. Consequently, other than the school scholarships, the only public assistance she receives is the twins' $960 a month social security benefits; however, she is concerned. Considering her past and present circumstances, Ms. Ivory questioned whether she made the right decision regarding public assistance. "Maybe I should have stayed on it," she testified at trial. Transcript, page 37. "I am afraid that I may have to go back on disability due to my inability to keep a job because of health problems," she explained in her affidavit. Affidavit of Tiffany Ivory, filed August 29, 2001, Proceeding No. 28 in Adversary Proceeding No. 00-00014.

E. Employment and Income

When Ms. Ivory filed her bankruptcy case in October 1999 she was working at Children's Hospital in Birmingham, Alabama. She had surgery in the Spring of 2000. In May 2000 she was allowed six weeks medical leave without pay. When she returned to work in July 2000, she was informed that her job had been eliminated.

Ms. Ivory remained unemployed for about six months. In January 2001, she found a job as a medical biller at another hospital, Medical Center East. She was employed there at the time of the trial of this matter. Her gross, pre-tax monthly paycheck was $1,567.00.

Ms. Ivory lost her Medical Center East job after a post-trial hospitalization but recently obtained employment with Franklin Collection Service. Unfortunately, this job is also in jeopardy. In her affidavit, Ms. Ivory testified, "I may also lose this job due to my health problems because I have already had to miss several days." Id.

Ms. Ivory is currently paid $8.50 per hour. Health insurance is not available.

F. Earned Income Tax Credit and Tax Refunds

Ms. Ivory ordinarily receives an earned income credit on her federal income taxes and has, for the past two or three years, received an income tax refund. However, each of those refunds was seized by the Social Security Administration to recoup an overpayment of $8,000. Before she moved to Birmingham, Ms. Ivory received the personal social security disability benefits described above. When she advised the Social Security Administration that she was working and sent them her pay records, the Administration informed her that because of that income, her benefits, and the twins' benefits, she had been overpaid.[8]

G. Transportation

Ms. Ivory owns a 1989 Pontiac Safari station wagon. When it runs, it is not reliable. Ms. Ivory represented that when coming to the trial of this matter, (after taking her children to school), that car broke down on the interstate. She walked to her mother's house. From there she walked to the nearest bus stop and caught the bus.

Ms. Ivory explained that her lack of reliable transportation was particularly critical at the time of the trial because she was in a six month probation period on her new job. A condition of that probation was that she not miss any work during that period.[9]

897*897 Clearly, Ms. Ivory must have reliable transportation if she is to remain gainfully employed. Equally clear however, is that Ms. Ivory does not have sufficient income either to purchase a vehicle or to maintain the one she has. Ms. Ivory could rely on public transportation but she did testify that the regular bus trip from her house to Medical Center East, after leaving her children at school, was about two and a half hours.[10]

H. "Current" Expenses

Ms. Ivory lists monthly expenses of $2,502 in Schedule J of her bankruptcy petition. Those expenses include: rent $600; electricity and natural gas $160; water and sewer $45; telephone service $75; food $450; clothing $200; laundry and dry cleaning $80; medical and dental expenses $185; transportation related expenses (not including car payment) $120; recreation $50; charitable contributions $100; life insurance $67; automobile installment payment $150; and the twins' school tuition $220.

Since she filed her petition, most of those expenses have increased. And she is in arrears on some of them. In the Winter of 2000, Ms. Ivory's natural gas bill averaged over $500 a month. Electricity is about $77 a month now. Water is about $92.[11]Telephone service is $100 (including an internet provider.)[12] Gasoline for her car is about $50 a week.

I. Housing

At the time of trial, Ms. Ivory and her children rented a house for $600 a month. She was however, paying her landlord $800 a month, which included $200 toward rent arrears. That arrears occurred when she was unemployed for the six months prior to her employment at Medical Center East.

When Ms. Ivory lost her job at Medical Center East, she again defaulted on her rent. She and her children were eventually evicted.

Ms. Ivory's current rent is $325 per month. That amount is of course substantially less than her last; however, because of the eviction and move, Ms. Ivory incurred moving expenses. She is also being sued by her prior landlord for $6,200 in unpaid rent.

J. Family Assistance

Ms. Ivory does not, and cannot, expect any assistance from her family. Her mother (who attended the trial), receives a widower's pension, has diabetes, and lives alone.[13] Her brother is in prison serving a life sentence and her sister is disabled and has four children.

K. Payments on the Student Loan

Ms. Ivory thinks that she tried to make twenty-five dollar payments on the student loan.

L. Post-trial Conditions

Ms. Ivory testified at trial, "I hate looking in the future because I am always getting disappointed." Transcript at 35. The affidavit she filed on August 29, 2001, explains that pessimism. The affidavit reads:

898*898 My name is Tiffany Ivory. I am before this Court requesting a discharge of my student loan. Since my last appearance in Court I was hospitalized twice for asthma attacks. One of the hospitalizations lasted for over 1 week. After one of hospitalizations for an acute asthma attack, I lost my job at Medical Center East Hospital. Additionally, I have incurred further medical debt in the amount of $11,400.00 because of surgery and hospitalization making my financial future very bleak. I currently have no medical insurance, and the medical debts mentioned above will not be covered by insurance. I am responsible for the medical debts even though I have no way to pay it at the present time. I also have systemic Lupus which was in remission but has now resurfaced again. I am currently taking several medications which are not covered by insurance. These prescription drugs cost me $268.00 per month. Because of recent financial problems caused by the loss of my job and my deteriorating health, I was evicted from my home. I am currently being sued by my landlord for $6,200.00 for rental arrearages. Because of the eviction, I have had to move causing additional expenses. My new rent is $325.00 per month. I have recently secured employment with Franklin Collection Service. I am paid $8.50 per hour but have no health insurance through my new employer. However, I may also lose this job due to my health problems because I have already had to miss several days. I am afraid that I may have to go back on disability due to my inability to keep a job because of health problems.

I am requesting that my current employment status and my current medical debt be considered by this Court in determining whether to grant discharge of my student loan.

Affidavit of Tiffany Ivory, Proceeding No. 28, Adversary Proceeding No. 00-00014.

V. Conclusions of Law

A. The Brunner Factors

As discussed above, the Brunner factors assist a court in determining whether "undue hardship" (the criteria that section 523(a)(8) of the Bankruptcy Code requires a court to find before a student loan debt may be discharged), exists. If a court finds that the Brunner factors are satisfied, the court may then find that undue hardship exists and that a student loan is dischargeable.

Based on the evidence, the Court finds that Ms. Ivory has satisfied the three-part Brunner test. Specifically the Court finds that:

1. Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loan;

2. Additional circumstances exist indicating that Ms. Ivory's state of affairs is likely to persist for a significant portion of the repayment period of the student loan; and,

3. Ms. Ivory has made a good faith effort to repay the loan.

Consequently, for the reasons expressed below, the Court finds that an undue hardship would be imposed on Ms. Ivory and her dependents if she is required to pay her student loan. Therefore, as allowed by section 523(a)(8), the Court concludes that excepting Ms. Ivory's student loan from her discharge in this case, "will impose an undue hardship," on her and her dependents. And finally, pursuant to section 523(a)(8), the Court concludes that Ms. Ivory's student loan is dischargeable.

899*899 **1. The First Brunner Factor**

The first Brunner factor requires Ms. Ivory to prove that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay her student loan. The key to that factor is of course: What is a "minimal standard of living?"[14]

This Court believes that a minimal standard of living is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities. To determine whether this debtor can maintain that standard of living, this Court has: (a) identified the specific items necessary for a minimal standard of living; (b) conducted a subjective evaluation of the debtor's income and expenses; and (c) conducted anobjective evaluation of the debtor's income and expenses.

a. Specific Items Necessary for a Minimal Standard of Living

This Court believes that a minimal standard of living in modern American society includes these elements:

1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates it also must be heated and cooled.

2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate. People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.

3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.

4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.

5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.

6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

b. A Subjective Evaluation of the Debtor's Income and Expenses

(1) Expenses

Common sense, knowledge gained from ordinary observations in daily life, and general experience, establish skills from which most people can determine whether someone's expenses are unnecessary or unreasonable, whether someone is paying for something that is not needed, or 900*900 whether someone is paying too much for something that is needed. This Court has called on those skills to evaluate Ms. Ivory's expenses for reasonableness and to establish a "minimal" monthly average for those expenses.[15]

Ms. Ivory described a budget in Schedule J of her bankruptcy petition that is severely limited. That budget includes expenses totaling $2,502, but it does not include many items that appear on the budgets submitted by most bankruptcy debtors such as child care, home maintenance, renter's insurance, health insurance, holiday gifts, birthday gifts, or school supplies and other school related expenses for children. It does not include any surplus for under-budgeted expenses and those other "unanticipated" expenses which seem, for every family, to inevitably pop-up each month but defy neat categorization. And it does not include other items that many would argue are "necessary" for even a minimal lifestyle. And unfortunately, it does not even represent Ms. Ivory's post-filing expenses or her current circumstances.

At trial and in her affidavit, Ms. Ivory testified that her monthly living expenses have increased dramatically. While her current rent is less than that at the time of the trial, she now has the additional debt burden represented by a $6,200 rent arrearage for which her prior landlord has filed suit. Her car has broken down requiring costly repairs. Her natural gas bill has risen dramatically.[16] Her monthly electricity and water bills have increased. She requires more medications than she did when she filed her petition. And her transportation expenses have increased.

Ms. Ivory's unpaid bills and other continuing obligations also contribute to increases in monthly expenses. She maintains arrearage balances for last winter's natural gas bills and for the twins' school tuition and after school care. She is still paying $53 a month toward the purchase of a computer and $25 a month for an internet provider. And she has incurred significant medical debts since filing her petition, debts she cannot discharge in this case.

Based on the above, the Court finds that if Ms. Ivory paid the expenses she listed in her Schedule J budget, (including the increases in those expenses since she filed bankruptcy), and she paid for necessary expenses omitted by her from the schedule, (such as car repairs and after-school care), her monthly expenses would be, at a minimum, $3,100.[17] The Court also finds that these expenses are both reasonable and necessary.

901*901 (2) Income

(a) Base Income

Because Ms. Ivory's employment has been sporadic, it is difficult for the Court to establish a reliable income benchmark for determining whether or not she can support herself and her family and pay the debt to USDE. But, based on the evidence, it is possible to establish a reliable range sufficient to reach the conclusions necessary to resolve the matters before the Court.

When Ms. Ivory filed bankruptcy, she was working at Children's Hospital as a medical billing representative. Her gross monthly pay was $1,441 and her net pay was $1,051. According to Schedule I of her bankruptcy petition, she had held that position for only nine months. In the Spring of 2000, after filing bankruptcy Ms. Ivory was away from work for surgery. In May 2000, she was away from work for an additional six weeks to recover from that surgery. In July 2000, her position at Children's was eliminated. She remained unemployed for about six months. In January 2001, she went to work for Medical Center East. Her gross monthly pay for that new position was $1,567.[18]

During her brief eight months at Medical Center East, Ms. Ivory was frequently absent from work. She spent some of that time with her oldest son who was injured at school; however, most was consumed by three personal hospitalizations for asthma.

Ms. Ivory recently obtained a new job. Her gross pay is $1,360 per month. Unfortunately however, she has already missed time from that job because of illness. And she believes she is in jeopardy of losing that job also.

(b) Government's Contention

The government contends that Ms. Ivory can pay her student loan debt while maintaining a minimal lifestyle; however, that contention assumes Ms. Ivory will be, and will remain, employed. Based on the evidence, this Court cannot make the same assumption.

Because of Ms. Ivory's unstable health and her children's chronic maladies, her employment has been sporadic. She has been unemployed frequently and for lengthy periods. There is no evidence that she will even be able to remain in her present job or that her general situation will change. In fact, the evidence supports the opposite.

During the past two and a half years, Ms. Ivory has had three different jobs with intermittent periods of complete unemployment. She has missed substantial time from her two prior jobs because of illnesses and has already missed time from her present job for the same reason. And again, she is in jeopardy of losing another job because of her illnesses.

The evidence demonstrates that Ms. Ivory is not employable on a full-time basis. And unless there is some dramatic change, either in condition or treatment, that situation will not change.

(c) Maximum and Consistent Income

The evidence establishes that Ms. Ivory's only consistent income is the social security disability benefits her twins receive. 902*902 And it is clear from that evidence that those funds are not even sufficient for the needs they are intended to satisfy, much less enough to pay the additional necessary living expenses of the family.[19]And it is equally clear, from the analysis of her income discussed below, that even if Ms. Ivory is able to continue to be employed, whether part-time or full-time, her situation will not improve.

If Ms. Ivory works half of the time, (an amount consistent with past performance), the maximum she can expect to earn is about $628 per month.[20] That figure, added to the twins' $960 disability check, would create monthly "income" of $1,588. Assuming minimum expenses of $3,100, Ms. Ivory would already be about $1,500 in arrears in meeting her family's monthly basic necessities.

If Ms. Ivory could and did work full-time, (at her current monthly rate), her income would be about $2,216 (including the twin's $960).[21] Again, even with that additional income she could not pay $3,100, the amount the Court finds is necessary just to pay minimum expenses.[22]

In regard to income, the Court must conclude that Ms. Ivory will be unable to remain consistently employed at any job for any appreciable length of time and that Ms. Ivory's income, if it does not decrease, will at best remain the same.

(3) Conclusions from a Subjective Evaluation

Ms. Ivory's income is insufficient to cover basic living expenses. Imposition of the additional burden of making any payment to the USDE would place her, and her children, in a state of deprivation more onerous than "substantial hardship." In other words, for Ms. Ivory and her children, life is already a "substantial hardship." Requiring her to pay her student loan would represent something worse, a level of sacrifice that is well beyond the statutory prerequisite for dischargeability. A single mother in ill health, with three unhealthy children, simply cannot provide a minimal standard of living on either $1,588 or $2,216 a month with expenses of at least $3,100.

From its subjective evaluation of Ms. Ivory's income and expenses, the Court concludes that Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loan. She simply does not have the money to provide for the basic necessities of modern903*903 life, much less have an ability to repay the student loan.

c. An Objective Evaluation of the Debtor's Income and Expenses

(1) Widely Accepted Objective Criteria

Each criterion discussed below reflects a circumstance similar to Ms. Ivory's. Each is a widely accepted objective measurement appropriate for comparing individuals' income and expenses.[23] And together, these items represent a part of the core of an objectively based minimal monthly budget 904*904 for a family of four.[24]

(a) Rent and Non-Telephone Utilities

According to the United States Department of Housing and Urban Development, the fair market value for rent and non-telephone utilities for the lower 40th percentile of three bedroom rental residences in the Birmingham, Alabama metropolitan area for the fiscal year 2001, is $717 per month. Dept. of Housing and Urban Development,50th Percentile and 40th Percentile Fair Market Rents for Fiscal Year 2001; Final Rule, 66 Fed.Reg. 165 (2001).

(b) Groceries

According to the "Official USDA Food Plans," of the United States Department of Agriculture, the average monthly cost of a "low-cost" meal plan for a family of four, with children of an ages similar to Ms. Ivory's, is $577.10.[25] That figure is based on the assumption that all meals and snacks are purchased at stores and prepared at home.

(c) Personal items

According to the United States Bureau of the Census, the average consumer unit earning gross annual income of $15,000 to $19,999 spends $28.91 each month on "housekeeping supplies" and $24.50 each month on "personal care products." Bureau of the Census, U.S. Dept. of Commerce, Consumer Expenditure Survey1999, "Table 2. Income before taxes: Average annual expenditures and characteristics."[26] Those amounts total $53.41.

905*905 (d) Transportation

According to the American Automobile Association, the cost to purchase, own, operate and maintain an economy automobile, assuming that it is driven 10,000 miles per year or less, is about 55.1 cents per mile.[27] Based on that data, an average monthly car-related expenditure is about $460.

(e) Clothing

According to the United States Bureau of the Census, the average consumer unit earning gross annual income of $15,000 to $19,999 spends $113.00 each month on "Apparel and services." Bureau of the Census, U.S. Dept. of Commerce, Consumer Expenditure Survey 1999, "Table 2. Income before taxes: Average annual expenditures and characteristics."[28]

(f) Medical Expenses

According to the United States Bureau of the Census, the average consumer unit earning gross annual income of $15,000 to $19,999 spends $160.00 each month on "Health care." Bureau of the Census, U.S. Dept. of Commerce, Consumer Expenditure Survey 1999, "Table 2. Income before taxes: Average annual expenditures and characteristics." The average consumer unit consisting of four persons, without regard to income, spends $172.50 each month on "Health care." Id.,"Table 4: Size of consumer unit: Average annual expenditures and characteristics."

According to a 1999 study conducted by the National Coalition on Health Care, privately obtained individual health insurance coverage costs a family of four from $416 to $583 a month. Steven Findlay & Joel Miller, Down a Dangerous Path: The Erosion of Health Insurance Coverage in the United States (National Coalition on Health Care 1999).[29]

(g) Conclusions from Objective Criteria

Ms. Ivory's anticipated monthly income is $1588.00. The items discussed above cost between $1,967 and $2,223.[30] Obviously Ms. Ivory cannot pay for everything that she and her children need to live each month, much less pay for additional items, whether those items are essential or not. In fact, after paying for rent, non-telephone utilities, food, housekeeping supplies, and personal care items, Ms. Ivory will be left with nothing each month to pay for clothing, telephone, child care, school supplies, medical and dental expenses, household furnishings and appliances, home maintenance, life insurance, recreation, charitable contributions, automobile 906*906related expenses, or unanticipated expenses.

The Court must conclude that like many people living on minimal income, Ms. Ivory cannot maintain a minimal standard of living.

(2) Widely Accepted Objective Standards

Additional tools exist for evaluating a debtor's income and expenses. These include widely accepted objective standards utilized by governmental agencies and private organizations. These standards are helpful not only in evaluating an individual's income and expenses but are helpful also in comparing one individual's expenses and income to those of the general population.

(a) Internal Revenue Service Collection Financial Standards

Internal Revenue Service "Collection Financial Standards" are objective standards used to determine "cut-outs", (as against IRS collection measures), of income for basic living expenses for delinquent taxpayers.[31]

Generally, the standards provide, "Necessary Expenses are the allowable payments you make to support you and your family's health and welfare and/or the production of income."[32] Specifically, the standards establish allowances for certain categories of expenses. These include:

1. various living expenses including food, housekeeping supplies, apparel and service, personal care products and services, and miscellaneous;

2. housing and utilities; and

3. transportation costs, to include ownership costs and monthly operating costs.

Within those categories, the standards allow:

1. a family of four, (earning gross monthly income of $1,250 to $1,669), $800 a month for various living expenses;[33]

2. a family of four or more living in Jefferson County, Alabama, $991 for housing and utilities;[34] and,

3. $642 for owning ($407) and operating ($235) one automobile.[35]

These standards suggest that a family of four in Ms. Ivory's income bracket needs $2,433.00 a month to pay for necessary living expenses. If the Court applied these standards to Ms. Ivory and her family, it is clear that she lacks sufficient income even to pay for the things the IRS believes she and her family need to survive each month.

907*907 (b) United States Department of Health and Human Services' 2001 Poverty Guidelines

For convenience, some courts have adopted the United States Department of Health and Human Services Poverty Guidelines as the minimal standard of living for purposes of student loan dischargeability questions and recognize an annual income above or below that standard as exceeding or falling below the minimal standard of living.[36]

By definition poverty is, "The condition of having little or no wealth or material possessions; indigence, destitution, want."[37] In other words, it is, "Lacking the necessaries of life; in needy circumstances."[38] Clearly, if an individual lacks the necessaries of life, that individual cannot be said to be living a minimal standard of living.

In contrast, minimal means an amount, quantity, or degree that is the least possible.[39] Maybe it does not include everything an individual may want, but at least it includes the smallest degree of income necessary to cover those expense essential for daily existence. It is not, like poverty, a lifestyle lacking in necessities. It is an existence that includes making a living and earning a salary at such a level that the individual can maintain that level and pay a student loan. If it did not, how could a student loan ever be paid?

Because a "poverty" level of living and a minimal standard of living are so dissimilar, this Court does not accept that some small "current" income amount over the poverty level establishes a minimal standard of living. In the dischargeability context, an individual must be able to maintain a minimal standard of living before a court may require that person to pay a student loan. That decision cannot be made based simply on whether a debtor's annual income is above or below a poverty level. On the other hand, this Court does accept that these "poverty" level guidelines are helpful in comparing an individual's income and expenses to other individuals.

In that regard, according to the guidelines, a family of four with annual gross income of $17,650 or less, is considered "officially" impoverished. Ms. Ivory's anticipated gross family income, including the twins' social security benefits, is approximately $19,690 per year. That of course is an excess of $2,030 above the poverty line; however, it is clear that this amount will easily be consumed by the extraordinary health care expenses directly resulting from the severe and chronic illnesses suffered by Ms. Ivory and her children. Consequently, if the Court considers Ms. Ivory's extraordinary medical expenses, which it must, the Court must conclude that Ms. Ivory and her children are, in fact, living in poverty.

(c) The Economic Policy Institute Studies

(i) The First Study

In 2000, the Economic Policy Institute published an extensive and comprehensive908*908 analysis and discussion of the specific budgetary requirements of American working families.[40] In this first study, the Institute identified basic needs and determined minimum monthly costs for those needs. Jared Bernstein, Chauna Brocht & Maggie Spade-Aquilar, How Much is Enough? Basic Family Budget for Working Families (Economic Policy Institute 2000).[41] Tables 8A and 8B of the study summarize budgets formulated by various scholars, economists, researchers, and government agencies for 19 basic needs.

The study demonstrates that the average monthly budget for a theoretical family consisting of a single parent and two children was $2,460.00. The lowest basic monthly budget reviewed for the same theoretical three-person family was $1,948.54. The average monthly budget for a theoretical family consisting of two parents and two children was $2,954.01. And the lowest basic monthly budget for the same theoretical four-person family was $2,239.55.

Comparison of these budgets to Ms. Ivory's budget demonstrates that Ms. Ivory does not earn enough to pay for basic needs. Her anticipated monthly income, (for use by four people) is less than the lowest monthly budget figure reviewed in the study, (an amount based on the needs of three.) And it is clear that Ms. Ivory's current situation must be even more disparate when inflationary differences in the study's 1996 figures and Ms. Ivory's 2001 figures are considered.[42]

(ii) The Second Study

Subsequent to "How Much is Enough," EPI published a second and similar study. The second study established basic family budgets for every metropolitan area in the United States and a combined rural budget for each state. The study explains:

To create these budgets, we first determined the items necessary for a working family to maintain a safe and decent standard of living, then determined the cost of providing each item at an adequate level based on family composition. The cost estimates are based on the following sources (see Appendix A for a more detailed account of the methodology):

Food is based on the minimum amount a family needs to spend for food prepared at home, as recommended by the U.S. Department of Agriculture's "low cost food plan."

Housing is based on a two-bedroom apartment (for families with one or two children) or a three-bedroom apartment (for families with three children) that costs no more than 40% of all structurally safe and decent housing in the community, as measured by the Department of Housing and Urban development's fair market rents.

Health care expenses are based on an amount that recognizes that not all families receive health insurance 909*909 through their employers. We use a weighted average of the employee share or the premium for employer-sponsored health insurance (from the Bureau of Labor Statistics) and the premium costs for a non-group plan (from an online insurance quote service), plus the cost of out-of-pocket medical expenses (from a Levin Group model).

Transportation costs are based on average miles driven for work and other necessary trips. This amount takes into account different driving distances for cities, suburbs, and rural areas, from the Department of Transportation, and is based on the cost-per-mile estimates from the Internal Revenue Service.

Child care expenses are based on center-based child care or family care centers for 4- and 8-year-olds, as reported by the Children's Defense Fund.

Other necessary expenses are based on the cost of telephone service as reported by the Federal Communications Commission, and the cost of clothing, personal care, household items, bank fees, union dues, reading materials, school supplies, and television as reported in Consumer Expenditure Survey.

Taxes include federal payroll taxes and federal, state, and local income taxes. This expense also takes into account funds received from the federal and state EITC and the Child and Dependent Care Tax Credit.

The budgets do not include the cost of restaurant meals, vacations, movies, or savings for education or retirement.

Heather Bouchsey, Chauna Brocht, Bethney Gunderson, & Jared Bernstein, Hardships in America: The Real Story of Working Families 8-9 (Economic Policy Institute 2001).

From that criteria, the researchers determined that a family of four, consisting of one parent and three children, living in Birmingham, Alabama, needs a gross monthly income of $3,165.00, (or about what this Court calculated the minimal costs of Ms. Ivory's basic necessities), to provide themselves with basic necessities. Obviously, Ms. Ivory's anticipated monthly income is much less.

(d) Conclusion to Objective Standards

The Court finds that Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay her student loan.[43] She simply does not have the money to provide for the basic necessities of modern life, much less an ability to repay the student loan.

d. Conclusion to the First Brunner Factor

From both the subjective and objective evaluations discussed above, the Court concludes that Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay her student loan.

2. The Second Brunner Factor

The second Brunner factor asks whether there are additional circumstances that exist which indicate the state of affairs (that is the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loan) is likely to persist for a significant portion of 910*910 the repayment period of the student loan. Clearly there are such circumstances here.

Ms. Ivory's income is insufficient to support a minimal lifestyle or to pay for simple necessities. She is living "hand-to-mouth", "paycheck-to-paycheck", and has been doing so for many years. Financially, the future promises no better. Ms. Ivory has no special skills which might qualify her for more lucrative paying jobs. And her opportunities for training and education are severely limited because of a lack of funds and those opportunities are consistently interrupted by her various illnesses and by the demands of caring for sick children and an elderly mother.

Ms. Ivory's severe and persistent illnesses, and those of her children, effectively prevent her from working on a full time, daily basis. Absences resulting from those illnesses have already cost her several jobs. Those same illnesses, which are not getting better and which are likely to persist, have generated an avalanche of medical bills and continue to press her further in debt.

Ms. Ivory's austere financial existence has persisted well beyond the repayment period of her student loan. That existence is a direct result of her infirm physical condition, the infirm condition of her children, and her limited earning capacity, (which is restricted not just by her physical infirmities, but also by her limited education and training.) None of these conditions are likely to change.

In regard to the second Brunner factor, the Court finds that additional circumstances exist and that those circumstances indicate that Ms. Ivory's state of affairs will persist for a significant portion of the repayment period.

3. The Third Brunner Factor

The third Brunner factor questions whether a debtor has made a good faith effort to repay the loan.

Ms. Ivory contends because she has never had the financial ability to pay her student loan, her failure to make payments on her student loan cannot constitute bad faith.

The government contends that Ms. Ivory may not rely on an inability to pay to demonstrate good faith, but that she must affirmatively demonstrate that, "she has made a `true effort' to maximize financial resources and has been careful to minimize expenses," and that she must, "show that she has made a bona fide attempt to repay the student loan." Defendant's Response to Plaintiff's Statement of Position at 3, filed June 15, 2001, Proceeding No. 26 in Adversary Proceeding No. 00-00014.[44]

a. Maximize Income and Minimize Expenses

In support of its first contention the government argues, "As to the first requirement, a debtor cannot be found to have maximized financial resources and minimized expenses, when the debtor has created or contributed to his or her own financial hardship." Id. at 4 (citations omitted) (emphasis added). The government concludes:

> In our present case, Plaintiff, after incurring her student loan indebtedness, choose to have three children even though she had no husband and her health was allegedly so poor as to render it difficult to work to support herself. This decision was not beyond the Plaintiff's control and clearly shows no effort to minimize expenses.
>
> 911*911 Id. (citations omitted).[45]

This Court must reject that argument. There is nothing in the Bankruptcy Code that suggests that Congress did not intend for student loan debtors to procreate. The reasons for such an omission are obvious. Writing for the United States Supreme Court in Carey v. Population Services, Intern., 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977), Justice William J. Brennan, Jr. stated:

Although "(t)he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to . . . procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-542, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). . . . "

Id. at 684-85, 97 S.Ct. 2010 (citing Roe v. Wade, 410 U.S. 113, 152-53, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)) (emphasis added).

Further in Carey, Justice Brennen explained specifically:

> The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, Griswold v. Connecticut, [381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)] supra, and most prominently vindicated in recent years in the contexts of contraception, Griswold v. Connecticut, supra; Eisenstadt v. Baird, supra; and abortion, Roe v. Wade, supra; Doe v. Bolton, 410 U.S. 179[, 93 S.Ct. 739, 35 L.Ed.2d 201] (1973); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976). This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive. "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, supra, 405 U.S., at 453[, 92 S.Ct. 1029]. (Emphasis omitted.)
>
> Id. at 685, 97 S.Ct. 2010.

Absent an unequivocal pronouncement from Congress, or a court with authority to bind this Court, this Court will not find that an obligation to pay a student loan is superior to an individual's fundamental right of procreation.

Consequently, the Court finds that under Ms. Ivory's particular impecunious circumstances, the "good faith" element of 912*912 the Brunner test has been satisfied. After incurring her student loan, Ms. Ivory has remained optimally employed, when her health allowed. Unfortunately, her lack of any specialized skills has relegated her to relatively low-paying jobs; however, during that time she has demonstrated a willingness to accept those positions. Other than sacrificing even more, there is nothing else Ms. Ivory could have done. This Court will not consider whether "not having children" is such an appropriate sacrifice.

b. Bona Fide Effort to Pay

In support of its second contention the government argues:

> As to the second requirement of the Johnson test, the Plaintiff testified she never contacted the Department of Education to try to set up a payment schedule or compromise her indebtedness, and never made a voluntary payment on her indebtedness, because her sister told her no payment was necessary if the school she had attended had gone out of business. She also testified she made no effort to verify the accuracy of her sister's advice. Thus, Plaintiff cannot be said to have made a bona fide attempt at payment.
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> Id. at 5.

It has been asked, "Can't everyone pay just a little?" That question may be answered, "A debtor's ability to pay is a function of the level of sacrifice demanded." Teresa A. Sullivan, et al., As We Forgive Our Debtors 200 (1989).

Applying this sobering hypothesis, clearly the direct answer to the question is yes, everyone can pay something.[46] But, as a society we have decided that we are not going to demand certain levels of sacrifice, at least with regard to payment of student loans. We are not going to require an individual to pay a student loan if that person cannot maintain a minimal standard of living. The reasoning lies in the structure of the Bankruptcy Code.

Most of the debts designated in section 523 of the Bankruptcy Code as "non-dischargeable" are simply that — not dischargeable under any circumstances. Student loan debts are an exception; their "non-dischargeability" is qualified. A student loan may be discharged if excepting it from discharge would impose an "undue hardship" on the debtor.

Yes, everyone may be able to squeeze out a few "bucks" here and there, but neither Congress nor the Brunner court intended the price of a student loan discharge to be deprivation of basic needs. Demanding a sacrifice of that nature would be contrary to the Bankruptcy Code and at a minimum would thwart the congressional intent of section 523(a)(8) — that is, it could prevent student loans from ever being discharged.

This interpretation fits with the Brunner court's three-part test. A "hardship" that is "undue" is a condition, "which presses unusually hard upon one who has to endure it" and is beyond what is appropriate, warranted, or natural.[47] A person 913*913 who earns enough only to supply himself or herself with the means to survive and make a living, (and is not lacking in necessities), cannot pay any additional debt without suffering "undue hardship."

Clearly Congress did not intend, and the Brunner court did not recognize, that given the appropriate level of sacrifice, everyone has some "ability," to make some payment on a student loan. A person faced with the responsibility to pay a debt may be required to tighten his or her belt, but not so tight to cut off blood supply.[48]

Ms. Ivory clearly does not have an ability to pay her student loan debt and it is apparent that she has never had that ability. Consequently, she had, prior to the filing of the present Chapter 7 case, paid very little, if anything, on her student loan.[49]Should that be held against her? This Court believes not. There is no evidence that her failure to make more than token repayment, or no payment at all, is the result of "bad faith." Instead, the evidence indicates that Ms. Ivory failed to make payments because she did not have any money.

4. Conclusion to Brunner Factors

Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loan. Additional circumstances exist indicating that Ms. Ivory's state of affairs is likely to persist for a significant portion of the repayment period of the student loan. Ms. Ivory has made a good faith effort to repay the loan. Consequently, excepting Ms. Ivory'sstudent loan debt from her discharge in this case will impose an undue hardship on her and her dependents. Ms. Ivory's student loan should be discharged.[50]

VI. Conclusion

The Court finds that Ms. Ivory cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay her student loan, or any part of that loan, whether voluntarily through an agreed payment plan, or involuntarily through state law collection remedies. The Court also finds 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 loan as there is no realistic prospect that Ms. Ivory's financial situation will improve. And the Court finds that Ms. Ivory has made a good faith effort to repay the loan.

Consequently, the Court concludes that excepting Ms. Ivory's student loan debt from her discharge will impose an undue 914*914 hardship on her and her dependents. Ms. Ivory paid what she was able to pay. She maintained employment commensurate with her level of education and training and she earned income which coincides with her optimal earning potential. She has done enough and is entitled to a discharge that includes her student loan.[51] This Court will not demand any further sacrifice.

Ms. Ivory's student loan debt is dischargeable. The Defendant's Motion to Dismiss the complaint is denied.

[1] Section 523(a)(8) reads:

(a) A discharge under section 727 [of the Bankruptcy Code, 11 U.S.C. § 727] . . . does not discharge an individual debtor from any debt —

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or non-profit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8) (parenthetical added).

[2] The USDE filed a claim in this Chapter 7 asset case for $2,565.24. It has been paid $767.96. The stipulated balance is $1,797.28.

[3] The Court of Appeals for the Eleventh Circuit has not addressed this issue and thus has neither developed its own test nor adopted one of another court. See In re Mallinckrodt, 260 B.R. 892, 899 (Bankr.S.D.Fla.2001) and In re Roe, 226 B.R. 258, 269 n. 50 (Bankr. N.D.Ala.1998).

[4] According to Ms. Ivory, the school lost its accreditation because its administrators sought out financially disadvantaged people, (at welfare or unemployment offices), solicited enrollment, and encouraged those individuals to apply for student loans. Ms. Ivory represented that she first learned about her student loan while in class. She testified that a school administrator gave her a piece of paper and told her to sign it. She later discovered it was a student loan. Ms. Ivory was 18 at the time.

[5] In its brief, the government stresses that Ms. Ivory's children have different fathers and that she was never married to either. As discussed below, the government argues that Ms. Ivory should not have had these children because in doing so she was certain to impede her ability to pay her student loan debt.

[6] Ms. Ivory testified, "I don't receive a thing, not a dollar, not a call, not one thing." Transcript at 12.

[7] Ms. Ivory testified that the school tuition is $500 per month. Transcript at 20. After school daycare is about $200 per month after a twenty-five dollar per week, per child discount. Transcript at 19. As stated above, the twins receive $960 total per month in social security disability benefits. Transcript at 16.

[8] Ms. Ivory testified that she forgot to appeal that ruling.

[9] Ms. Ivory testified that she had already missed work to care for her oldest son who was injured in a sporting accident. And of course, she also missed work to attend the trial of this matter.

[10] There is no evidence about current travel times.

[11] She has called and complained because she believes her usage is less.

[12] Ms. Ivory is also paying for a computer. Her mother signed the note. Ms. Ivory pays half. Her mother pays half. The total payment is $106 per month. Ms. Ivory contends that the children need the computer and accompanying internet service and contends that the children's grades have improved with that assistance.

[13] Ms. Ivory testified that she cannot help her mother financially but does help in other ways.

[14] This Court has not previously answered this question. See Halverson v. Pennsylvania Higher Education Assistance Agency (In re Halverson), 189 B.R. 840 (Bankr.N.D.Ala. 1995); O'Flaherty v. Nellie Mae, Inc. (In re O'Flaherty), 204 B.R. 793 (Bankr.N.D.Ala. 1997); In re White, 243 B.R. 498 (Bankr. N.D.Ala.1999) reh'g denied 243 B.R. 515 (Bankr.N.D.Ala.1999).

[15] Like a jury, a court acting as a finder of fact is entitled to use common sense and general human experience and knowledge. Pacific Emp. Ins. Co. v. Orren, 160 F.2d 1011 (5th Cir.1947); Southern Shipyard Corp. v. The Tugboat Summitt, 294 F. 284, 285 (4th Cir.1923); Luna v. Luna, 592 N.W.2d 557, 565 (N.D.1999); Gross v. Connecticut Mut. Life Ins. Co., 361 N.W.2d 259, 269-270 (S.D. 1985);Kenney v. Rust, 17 Mass.App.Ct. 699, 462 N.E.2d 333, 338 (1984), review denied, 391 Mass. 1106, 464 N.E.2d 73 (1984); Richmond v. Richmond, 340 Mass. 367, 164 N.E.2d 155, 157 (1960); Mendoza v. Rudolf, 140

Cal.App.2d 633, 295 P.2d 445, 447 (1956); Johnson v. Snyder, 99 Cal.App.2d 86, 221 P.2d 164, 167 (1950); H.F. Wilcox Oil & Gas Co. v. Johnson, 184 Okla. 198, 86 P.2d 51, 53 (1937);Cary-Glendon Coal Co. v. Carmichael, 258 Ky. 411, 80 S.W.2d 29, 31 (1935). overruled in part on other grounds, Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581 (Ky.1967); Fitzgerald v. McDonald, 81 Colo. 413, 255 P. 989, 991 (1927).

[16] The Court takes judicial notice that the price of natural gas rose dramatically during this time.

[17] And that amount still does not include many items that most would consider necessary to maintain a minimal standard of living. It does not include any amount for unanticipated or emergency expenses, or home maintenance, or renter's insurance, or health insurance, or school related expenses, holiday gifts, or birthday gifts. It does not include anything for amortization of the approximately thirty-three thousand dollars in debt, (comprised of medical bills, rent arrears, school tuition and after-care arrears, and natural gas arrears), which Ms. Ivory has incurred since filing her bankruptcy petition.

[18] In the interim (in November 2000), Ms. Ivory was hospitalized because of an acute asthma attack. Even if she had retained her job at Children's Hospital, she would have missed additional time from that position.

[19] The government argues that the twins' social security benefits should be included in the calculation of Ms. Ivory's total income for purposes of deciding whether Ms. Ivory is able to pay herstudent loan. Even if this were legally correct, because Ms. Ivory cannot maintain a minimal standard of living even with the twins' social security payments, this Court need not address that issue.

[20] Ms. Ivory's current income is $1,360. The Court divided that amount by two and subtracted $52 for social security and unemployment taxes (where the withholding rate for social security taxes is 6.2% and medicare withholding rate is 1.45%). See 26 U.S.C. § 3101(a) & (b)(6).

[21] The Court added Ms. Ivory's current income of $1360, (less $104 for social security and unemployment taxes), to the twins' disability amount of $960.

[22] Ms. Ivory's most recent circumstances demonstrate any amount she earns will be further reduced because she will be required to pay accumulated post-petition debts of $33,000. For example, it is reasonable to assume that creditors on those debts will attempt to collect those debts by garnishment. Under Alabama and federal exemption laws, Ms. Ivory can protect only 75% of her wages, or an amount that is equal to the 30 times the federal minimum wage, (currently $5.15 per hour), whichever is more. Consequently, it is fair to anticipate that garnishments would reduce the $1,588 income by about $40 per month to $1,548, and the $2,216 income by about $314 per month to $1,902.

[23] Rule 201 of the Federal Rules of Evidence authorizes a court, whether requested or not and at any stage in a proceeding, to take judicial notice of a fact that is not subject to reasonable dispute in that it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. In this portion of its opinion, the Court takes judicial notice of, discusses, and relies on statistical data compiled by and published by the Bureau of the Census, United States Department of Commerce, the United States Department of Agriculture, the United States Department of Housing and Urban Development, and the American Automobile Association. There is ample authority to support taking judicial notice of, and reliance on, such widely accepted objective criteria.

That authority includes: Parker v. Brown, 317 U.S. 341, 363 n. 9, 364 n. 10, 365 n. 12, 366 n. 14-17, 367 n. 18, 63 S.Ct. 307, 87 L.Ed. 315 (1943) (judicial notice taken of statistical data about the California raisin industry appearing in publications of the U.S. Tariff Commission, the U.S. Department of Agriculture, the University of California, the Giannini Foundation of Agricultural Economics, the Federal Farm Board, the Commodity Credit Corporation, the Federal Surplus Commodities Corporation, the Surplus Marketing Administration, and the Agricultural Adjustment Administration);Knox v. Butler 884 F.2d 849 (5th Cir.1989) (census statistics), cert. denied, 494 U.S. 1088, 110 S.Ct. 1828, 108 L.Ed.2d 957 (1990); Beardmore v. Department of Agriculture, 761 F.2d 677, 679 (Fed.Cir.1985) (judicial notice taken of American Automobile Association's 1985 edition of the map of California); Barber v. Ponte, 772 F.2d 982, 998-99 n. 14-16 (1st Cir.1985) (judicial notice taken of official statistics respecting particular age group, including marital and divorce rates, school enrollment and educational attainment, economic status, employment rate, criminality, experience in such matters as armed forces in time of war or peacetime, mental health, attitude towards such important social issues as abortion, participation in political processes, and ownership of capital property compiled by census bureau and U.S. Dep't of Health and Human Services), cert. denied, 475 U.S. 1050, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986); Jones v. Illinois Dep't of Rehabilitation Services,689 F.2d 724, 728 (7th Cir.1982) (judicial notice taken that rubella epidemic in 1963-65 doubled number of births of hearing-impaired infants, with result that some 15,000 deaf individuals were at or approaching age of college or professional education, from study published in U.S. News & World Rep.); U.S. v. United Bhd. of Carpenters and Joiners of America, Local 169, 457 F.2d 210 (7th Cir.1972) (census statistics), cert. denied, 409 U.S. 851, 93 S.Ct. 63, 34 L.Ed.2d 94 (1972); Skolnick v. Board of Comm'rs of Cook County, 435 F.2d 361 (7th Cir.1970) (census statistics); Celebrezze v. Wifstad, 314 F.2d 208, 216 (8th Cir.1963) (judicial notice taken of facts regarding "dry farming" operations appearing in publications of the United States Department of Agriculture).

See also: American Transit Lines v. Smith, 246 F.2d 86, 90 (6th Cir.1957) (judicial notice taken of figures of American Automobile Association for 1955 showing that there were 62,053,697 automobiles, including buses and trucks, in United States), cert. denied, 355 U.S. 889, 78 S.Ct. 261, 2 L.Ed.2d 188 (1957); In re Snider Farms, Inc., 83 B.R. 1003, 1008 (Bankr.N.D.Ind.1988) (judicial notice taken of agricultural statistics issued by the Indiana Agricultural Statistics Service, a cooperative publication of the U.S. Department of Agriculture and Purdue University); Knollwood Bldg. Condominiums v. Town of Rutland, 166 Vt. 529, 699 A.2d 31, 42 (1997) (judicial notice taken of values published in annual aggregate fair market value report compiled by a public agency setting forth its factual findings pursuant to authority granted by law); Kennedy v. Kennedy, 662 So.2d 179, 182 (Miss.1995) (judicial notice taken of current timber prices in South Mississippi appearing in regular publication of Mississippi Department of Agriculture); Baldzicki v. Baldzicki, 1987 WL 8141, *3 (Ohio App.1987) (judicial notice taken of the United States Department of Agriculture's data on "annual cost of raising children"); Hollinger v. Shoppers Paradise of New Jersey, Inc., 134 N.J.Super. 328, 340 A.2d 687, 690 (1975) (judicial notice taken of facts regarding nature and characteristic of the disease trichinosis contained in United States Department of Agriculture publications), aff'd, 142 N.J.Super. 356, 361 A.2d 578 (1976); Application of Barbara, 14 Misc.2d 223, 180 N.Y.S.2d 924, 930 (N.Y.Sup.Ct.1958) (judicial notice taken of map of New York published by the American Automobile Association), aff'd, 8 A.D.2d 580, 183 N.Y.S.2d 143 (1959); Nicketta v. National Tea Co., 338 Ill.App. 159, 87 N.E.2d 30, 33 (1949) (judicial notice taken of facts regarding nature and characteristic of the disease trichinosis contained in United States Department of Agriculture publications); and In re Oleson, 68 S.D. 435, 3 N.W.2d 880, 881

(1942) (judicial notice taken of farm income and production in South Dakota per records of the United States and South Dakota Departments of Agriculture and of increase of bank deposits in state per report of state Superintendent of the Banks).

[24] These items do not include telephone expenses, child care expenses, school related expenses, expenses for household furnishings and appliances, home maintenance, life insurance, recreation, charitable contributions, or unanticipated expenses. And they do not include special financial needs of a family in which three of its members suffers from severe and chronic illnesses.

[25] U.S. Dept. of Agriculture, Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, February 2001, available at http://www.usda.gov/cnpp/FoodPlans/Updates/foodfeb01.PDF(October 19, 2001). The USDA calculation is based on the assumption that all meals and snacks are purchased at stores and prepared at home.

[26] The argument could be made that those figures do not form an appropriate basis for comparison because they are categorized by income rather than family size. But according to different census figures, categorized by "size of consumer unit," the average consumer unit consisting of four persons spends even more, that is $60.50 each month on housekeeping supplies and $43.25 each month on personal care products for a total of $103.75. Bureau of the Census, U.S. Dept. of Commerce,Consumer Expenditure Survey 1999. "Table 4: Size of consumer unit: Average annual expenditures and characteristics."

[27] This information is available from the American Automobile Association in its pamphlet, Your Driving Costs 2001, Stock No. 2717 (2001).

[28] Once again, because these figures are categorized by income rather than size of family, the argument could be made that they do not form an appropriate basis for comparison. But again, different census figures, categorized by "size of consumer unit," indicate that the average consumer unit consisting of four persons spends even more, $224.83 each month, for "Apparel and services." Bureau of the Census, U.S. Dept. of Commerce. Consumer Expenditure Survey 1999, "Table 4: Size of consumer unit: Average annual expenditures and characteristics."

[29] That study can be viewed at, or downloaded from,http://www.nchc.org/1999PolicyStudies/DownADangerousPath.html (October 19, 2001).

[30] While many of the above items above reflect "average" amounts for individuals or families, the Court does not suggest that "average" is necessary to maintain a "minimal" standard of living; however, it is obvious in Ms. Ivory's case that she and her family are so far below "average" that they are below "minimal." The objective standards discussed next clearly demonstrate that Ms. Ivory cannot even afford to pay for basic necessities.

[31] The standards may be viewed at http://www.irs.gov/plain/ind info/coil stds/index.html (October 19, 2001).

[32] Internal Revenue Service, U.S. Dept. of the Treasury, Offer in Compromise, at http:// www.irs.gov/plain/ind info/oic/necexpenses.html (October 19, 2001). That characterization agrees with this Court's view that a minimal standard of living is one where a person earns the smallest degree of

income necessary to cover expenses required to make a living and earn a salary, including expenses essential for daily existence.

[33] Internal Revenue Service, U.S. Dept. of the Treasury, Tax Info for You, Collection Financial Standards, Allowable Living Expenses for Food, Clothing and Other Items, at http:// www.irs.gov/plain/ind info/coll stds/cfs-other.html (October 19, 2001).

[34] Internal Revenue Service, U.S. Dept. of the Treasury, Tax Info for You, Collection Financial Standards, Housing and Utilities Allowable Living Expenses for Alabama, at http:// www.irs.gov/plain/ind info/coll stds/cfs-al.html (October 19, 2001).

[35] Internal Revenue Service, U.S. Dept. of the Treasury, Tax Info for You, Collection Financial Standards, Allowable Living Expenses for Transportation, at http://www.irs.gov/plain/ind info/coll stds/cfs-trans.html (October 19, 2001).

[36] These guidelines define eligibility for certain government benefits and programs and are designed to assist the needy and economically disadvantaged. Annual Update of the HHS Poverty Guidelines, 66 FR 10695-01, 2001 WL 127217 (F.R.) (February 16, 2001).

[37] Oxford English Dictionary, 2nd. Ed. 1989, available at http://dictionary.oed.com (October 19, 2001).

[38] Oxford English Dictionary, 2nd. Ed. 1989, available at http://dictionary.oed.com (October 19, 2001).

[39] Oxford English Dictionary, 2nd. Ed. 1989, available at http://dictionary.oed.com (October 19, 2001).

[40] The Economic Policy Institute is a nonprofit, nonpartisan organization. According to the information published at http://www.epinet.org (October 22, 2001), its mission is to, "provide high-quality research and education in order to promote a prosperous, fair, and sustainable economy."

[41] This study and the second study discussed below can be downloaded from the EPI athttp://www.epinet.org/ (October 19, 2001).

[42] In addition, the study was ostensibly based on the needs of families with ordinary medical requirements. Ms. Ivory's family has substantially greater financial needs than the average family. If that factor is considered, it is clear that the differences between Ms. Ivory's needs and those of other families of four would be even greater.

[43] This conclusion would be the same even if the Court assumed that Ms. Ivory will work a full 40 hour work week, that existing creditors will not garnish her paycheck, and that Ms. Ivory's income is $2,320 ($1,360 wages plus $960 social security benefits).

[44] Citing Pennsylvania Higher Education Assistance Agency v. Deborah Lee Johnson (In re Johnson), 5 Bankr.Ct.Dec. 532 (Bankr.E.D.Pa. 1979).

[45] The government also argues that the debtor did not minimize expenses because she did not move to less expensive housing. Since the trial, the debtor has moved to less expensive housing.

[46] Ideally, a budget that reflects a minimal lifestyle does not contain anything unnecessary. In terms of a minimal standard of living, unnecessary could mean one of two things: (1) that is money is spent on something that is never necessary; or, (2) that too much is spent on something that is necessary. Clearly, a person with a student loan debt who can afford a minimal standard of living, but has money left over,

should pay that debt. But what that person may purchase before reserves are allowed to accumulate, is of course what defines a minimal standard of living.

[47] Oxford English Dictionary, 2nd. Ed. 1989, available at http://dictionary.oed.com (October 19, 2001).

[48] This Court has not addressed the issue of whether a debtor may be required to, or allowed to, pay part of a student loan debt. See the discussion of that issue in the opinion of another member of this Court in Howell v. The Education Resources Inst., 1996 WL 1062559 (Bankr.N.D.Ala.1996).

[49] There is some dispute on this point. Ms. Ivory testified that she may have made a couple of small payments on the loan. The Government, in its brief, asserts that she has made no payments, but offered no evidence in support of that assertion at trial.

[50] In its brief, the government suggests that Ms. Ivory should pay $15 each month for the next 10 years. In regard to the legal issues involved in that suggestion, see the case cited in note 48. In regard to the factual issues, this Court sees nothing to demonstrate that Ms. Ivory could ever consistently maintain a minimal lifestyle while making any meaningful payment toward her student loan debt, no matter how low the payment or how long the repayment period. As discussed throughout this opinion, this Court believes that the payment of any additional debt by a person who only earns enough to supply himself or herself with the means to survive, is an undue hardship.

[51] In reaching its findings of fact and conclusions of law, the Court relies on its opinions in Halverson v. Pennsylvania Higher Education Assistance Agency (In re Halverson), 189 B.R. 840 (Bankr.N.D.Ala.1995); O'Flaherty v. Nellie Mae, Inc. (In re O'Flaherty), 204 B.R. 793 (Bankr.N.D.Ala.1997); and In re White, 243 B.R. 498 (Bankr.N.D.Ala.1999) reh'g denied 243 B.R. 515 (Bankr.N.D.Ala. 1999) and the authority cited in those opinions.

In re Mosley, 330 BR 832, 43 - Bankr. Court, ND Georgia 2005

330 B.R. 832,43 (N.D. Ga. 2005)

In re Keldric Dante MOSLEY, Debtor.
Keldric Dante Mosley, Plaintiff,
v.
General Revenue Corp., U.S. Department of Education, Alcorn State University, Educational Credit Management Corporation, Defendants.

Bankruptcy No. 99-78810-CRM, Adversary No. 04-9139.

United States Bankruptcy Court, N.D. Georgia, Atlanta Division.

August 25, 2005.

833*833 Keldric Dante Mosley, East Point, GA, pro se.

Thomas W. Joyce, Jones, Cork & Miller, LLP, Macon, GA, for Educational Credit Management Corp.

SUPPLEMENTAL ORDER

C. RAY MULLINS, Bankruptcy Judge.

THIS MATTER is before the Court on the Complaint to Determine Dischargeability of Student Loan (the "Complaint"), filed on August 12, 2004. On July 20, 2005, a trial was held and the Court ruled that the Debtor's student loan obligations to Defendant Educational Credit Management Corporation ("ECMC") would be discharged pursuant to section 523(a)(8) of the Bankruptcy Code. On July 21, 2005, the Court entered a short order declaring that, for the reasons stated on the record, the Debtor is granted an undue hardship discharge and the debts owed to ECMC are dischargeable. The Court reserved the right to enter supplemental findings regarding this matter. Accordingly, this Order supplements the record.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), as well as Rule 1070-1 of the Local Rules of Practice for the United States Bankruptcy Court for the Northern District of Georgia. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

The issue before the Court is whether the Debtor, who is and has been homeless for several years and suffers from various physical and psychological ailments, is entitled to receive a discharge of his student loans. The Court holds that the Debtor has established, by a preponderance of the evidence, his entitlement to relief under section 523(a)(8) and the Brunner test. The Debtor has demonstrated that he cannot currently maintain a minimal standard of living even without the repayment of his student loans, he suffers from serious and ongoing physical and psychological disabilities which make it unlikely that he will have the ability to repay student loans in the future, and he has lacked funds to make any payments in the past.

I. FACTUAL BACKGROUND

The Debtor, proceeding *pro se,* filed a petition for relief under chapter 7 of the Bankruptcy Code on December 21, 1999. On May 15, 2000, the Court entered the Order Discharging Debtor(s), Approving Account, Discharging Trustee, and Closing Estate (Doc. No. 20), and the case was closed shortly thereafter. On May 5, 2004, the Debtor filed the "Complaint to Reopen Bankruptcy Case and to Cease All Collection Activities, Including Garnishment of Federal Income Taxes" (Doc. No. 22), which the Court construed as the "Motion to Reopen." On August 12, 2004, a hearing was held on the Motion to Reopen, and the Court granted the relief requested, reopening the case to allow the Debtor to file an adversary proceeding. The above-styled adversary proceeding was commenced on August 12, 2004.

The Debtor seeks a discharge of several student loans he incurred while attending Alcorn State University ("ASU"). According to the National Student Loan Data System, it appears that the Debtor had obtained several loans, including six Stafford Loans, through the Federal Family Education Loan Program in the approximate amount of $45,000.00.[1] The loans 837*837 were previously held by U.S.A. Funds and then were eventually transferred to ECMC. The Debtor, the first member of his family to go to college, attended ASU from the fall of 1989 until the spring of 1994. A history major, the Debtor testified that he was not awarded a bachelor's degree, as he needed to complete an additional five or six courses to graduate.

During his first semester at ASU, the Debtor joined the U.S. Army Reserve Officers' Training Corps ("ROTC"). In the summer of 1993, the Debtor was training for service in the Persian Gulf when he was involved in a debilitating accident. The Debtor testified that he fell off a tank, severely injuring his hip and his back.[2] Although the Debtor had completed his ROTC program, he resigned his commission because he felt that he was not healthy enough to attend officer school. Subsequently, the debtor was honorably discharged from the Army and left ASU to return to Atlanta.

The Debtor lived with his mother until 1999. He testified that during this time, his physical and mental condition "deteriorated," as he was depressed and drank heavily. The Debtor tried to return to college to obtain his degree but he could not receive the needed financial aid because his prior loans were in default. He then enrolled in a course at a heavy equipment school, but had difficulty learning the trade. Despite his efforts, the Debtor could not maintain employment. He held several different jobs. In particular, he was employed in unskilled labor positions for the United States Postal Service, the Bureau of Solid Waste of the City of Atlanta Department of Public Works, Hartsfield-Jackson Atlanta International Airport, and a moving company, and stated that the manual labor aggravated his back and hip injuries. The Debtor did receive worker's compensation for additional bodily trauma he suffered while working for the moving company.

The Debtor testified that his family did not understand his predicament, especially his emotional state and persistent unemployment. In January of 2000, the Debtor's mother evicted him from her home and had him involuntarily committed to Georgia Regional Hospital, a state supported facility that provides mental health services for those suffering from psychological disabilities. According to the Debtor's testimony, he was diagnosed with depression and an anxiety disorder. Though he had been in denial of these mental illnesses, after his release from the hospital he sought treatment through the Department of Veterans' Affairs (the "V.A."). He also sought medical care for his chronic back problems.

The Debtor continues to receive treatment from the V.A.'s mental health facility. He testified that since 2001, he has been taking prescription medication for his depression. The Debtor has also been prescribed four different drugs for his back pain and high blood pressure. Further, the Debtor receives physical therapy for his back. The Debtor stated that he often experiences acute discomfort due to his back injury, and he is still affected by his psychological disorders. According to several exhibits admitted into evidence during the trial, the Debtor suffers from chronic lower back pain with radicular component, depression, anxiety, hypertension, and high blood pressure and adjustment disorder with anxiety and dysthmia. *See* Plaintiff's Exhibits 1E and 1F.

838*838 The Debtor asserts that these ailments have adversely impacted his employment. He has not been steadily employed since July of 2003. Although the Debtor has not provided specific detail regarding his income, the Court will note that it is very minimal since the Debtor cannot afford life's basic necessities.[3] According to the Debtor's Social Security Earnings Statement, the Debtor has not earned more than $7,770.00 since 1994. *See* Plaintiff's Exhibit 2A. The following chart sets forth his past earnings:

Year	Taxed Social Security Earnings	Taxed Medicare Earnings
1994	$3,682.00	$3,682.00
1995	$6,929.00	$6,929.00
1996	$7,770.00	$7,770.00
1997	$? 12.00 (illegible)	$1,287.00
1998	$1,816.00	$1,816.00
1999	$3,641.00	$3,641.00
2000	$4,333.00	$4,333.00
2001	$4,472.00	$4,472.00
2002	$2,596.00	$2,596.00
2003	$3,599.00* (estimated)	
2004	unreported as of date of statement	

The Debtor testified that his monthly income is $210.00 from disability compensation provided by the V.A.[4] He also receives food stamps from the Georgia Department of Human Resources. Currently, he is registered with the Georgia Department of Labor in an effort to find employment. He has been homeless since he was evicted from his mother's home. The Debtor explains that he stays with different friends or family members every night. During the day, he travels to labor pools in search of work or spends time in parks or libraries. He owns virtually no property. The Debtor cannot even afford a car of any type. The Debtor, now thirty-four years old, has testified that he is doing the best he can to support himself. He admits that he has not made payments on his student loan obligations, which have been in default since July of 1996.[5]

II. ARGUMENTS

In the Complaint, the Debtor argues that, given his current income he cannot maintain a minimal standard of living and repay his student loans. He also claims that he made a good faith effort to repay his debts.

ECMC asserts that this has been a difficult case due to lack of discovery regarding the Debtor's medical conditions and employment history.[6] ECMC contends 839*839 that the Debtor has not shown that he has a disability and cannot work due to a disability. ECMC further alleges that the Debtor failed the Brunner test due to a lack of evidence, particularly in regards to his medical diagnosis and prognosis.

III. STANDARD

Courts generally afford *pro se* litigants special consideration. In *Haines v. Kerner,* the Supreme Court held that the pleadings of *pro se* litigants are subject to "less stringent standards than formal pleadings drafted by lawyers." 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Dioguardi v. Durning,* 139 F.2d 774 (2d Cir.1944)) (*per curiam*). Following the Supreme Court's ruling, the majority of courts liberally construe *pro se* pleadings, particularly complaints. *Hughes v. Rowe,* 449 U.S. 5, 9-10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) ("It is settled law that the allegations of such a complaint, `however inartfully pleaded' are held `to less stringent standards than formal pleadings drafted by lawyers. . . .'") (quoting *Haines,* 404 U.S. at 520, 92 S.Ct. 594); *Didie v. Howes,* 988 F.2d 1097, 1105 (11th Cir.1993) ("Further, we are mindful of the leniency accorded to review of the filings of *pro se* parties.") (citing *Haines,* 404 U.S. at 520-21, 92 S.Ct. 594).

IV. ANALYSIS

Section 523(a)(8) of the Bankruptcy Code restricts the dischargeability of government-guaranteed student loans. Specifically, the statute provides that a discharge pursuant to section 727 does not discharge a debt

for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an *undue hardship* on the debtor and the debtor's dependents. . . .

11 U.S.C. § 523(a)(8) (emphasis added). The phrase "undue hardship" is not defined in the Bankruptcy Code nor in the legislative history of section 523(a)(8). However, the Eleventh Circuit has adopted the test articulated in *Brunner v. New York Higher Educational Services Corp.,* 831 F.2d 395, 396 (2d Cir.1987), establishing the factors used to determine if the debt imposes an "undue hardship." *Hemar Ins. Corp. of Am. v. Cox (In re Cox),* 338 F.3d 1238, 1241 (11th Cir.2003), *reh'g, en banc, denied,* 82 Fed.Appx. 220, 2003 WL 22240497 (11th Cir.2003), *cert. denied,* 541 U.S. 991, 124 S.Ct. 2016, 158 L.Ed.2d 496 (2004). In fact, the Brunner test has been adopted by the majority of circuits.[7] *Educ. Credit Mgmt. Corp. v. Polleys,* 356 F.3d 1302 (10th Cir.2004); *United States Dep't of*

Educ. v. Gerhardt (In re Gerhardt), 348 F.3d 89 (5th Cir.2003); Ekenasi v. The Educ. Res. Inst. (In re Ekenasi), 325 F.3d 541 (4th Cir.2003); Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168 (9th Cir.2003); Goulet v. Educ. Credit Mgmt. Corp., 284 F.3d 773 (7th Cir.2002); Rifino v. United 840*840 States (In re Rifino), 245 F.3d 1083 (9th Cir.2001); Brightful v. Pa. Educ. Assistance Agency (In re Brightful), 267 F.3d 324 (3rd Cir.2001); United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108 (9th Cir.1998); Pa. Higher Educ. Assistance Agency v. Faish (In re Faish), 72 F.3d 298 (3d Cir.1995), *cert. denied,*518 U.S. 1009, 116 S.Ct. 2532, 135 L.Ed.2d 1055 (1996); In re Roberson, 999 F.2d 1132 (7th Cir.1993).[8] To satisfy the three-pronged Brunner test, the debtor must demonstrate:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] 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.

Cox, 338 F.3d at 1241 (quoting Brunner, 831 F.2d at 396). The debtor has the burden of proving the existence of undue hardship by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); Rifino,245 F.3d at 1087-88; Brightful, 267 F.3d at 327; Johnson v. Educ. Credit Mgmt. Corp. (In re Johnson), 299 B.R. 676, 680 (Bankr.M.D.Ga.2003) (Walker, J.). Generally, courts have held that the debtor must prove all three elements before a discharge can be granted; failure to prove any one element is fatal to the claim. Faish, 72 F.3d at 306; Rifino, 245 F.3d at 1088-89; Brightful, 267 F.3d at 328; Saxman, 325 F.3d at 1173; Educ. Credit Mgmt. Corp. v. Pope (In re Pope), 308 B.R. 55, 59 (N.D.Cal.2004); Norasteh v. Boston Univ. (In re Norasteh), 311 B.R. 671, 676 (Bankr.S.D.N.Y.2004); Williams v. N.Y. State Higher Educ. Serv. Corp. (In re Williams), 296 B.R. 298, 302 (S.D.N.Y.2003); Thoms v. Educ. Credit Mgmt. Corp. (In re Thoms), 257 B.R. 144, 148 (Bankr.S.D.N.Y.2001); Lehman v. N.Y. Higher Educ. Servs. Corp. (In re Lehman), 226 B.R. 805, 808 (Bankr.D.Vt.1998). "Undue hardship" contemplates unique, extraordinary, or severe circumstances, particularly under the second prong of the Brunner test, and thus courts must determine undue hardship on a case-by-case basis. Faish, 72 F.3d at 302. *See also* In re Ammirati, 187 B.R. 902, 907 (D.S.C.1995), *aff'd,* 85 F.3d 615 (4th Cir.1996); Ulm v. Educ. Credit Mgmt. Corp.,304 B.R. 915, 919 (S.D.Ga.2004) (Nangle, J.); Educ. Credit Mgmt. Corp. v. Boykin (In re Boykin), 313 B.R. 516, 522 (M.D.Ga.2004) (Fitzpatrick, J). Therefore, whether "undue hardship" exists is a mixed question of law and fact, and the Court's inquiry will be particularly fact-intensive. Educ. Credit Mgmt. Corp. v. Stanley, 300 B.R. 813, 816 (N.D.Fla.2003).

Under the first prong of the Brunner test, the debtor must demonstrate that, if "required to make the monthly student loan payment, his standard of living will fall below the minimum level." In re Brunner, 46 B.R. 752, 754 (S.D.N.Y.1985) (district court opinion establishing the Brunner test) (hereinafter "*Brunner II*"). Thus the debtor should show that, given current income and living expenses, repaying student loans prevents 841*841 him from maintaining a minimal standard of living for himself and his dependents. Ulm, 304 B.R. at 919 (citing Cox, 338 F.3d at 1241). In defining "minimal standard of living," courts often look at the poverty guidelines issued each year in the

Federal Register by the United States Department of Health and Human Services.[9] Although the Brunner test does not require that the debtor's income to be at or below the poverty line, a debtor whose income falls below the established poverty level presumptively meets the first prong. *Faish,* 72 F.3d at 306 ("The Brunner standard meets the practical needs of the debtor by not requiring that he or she live in abject poverty . . . before a student loan may be discharged."); *Ammirati,* 187 B.R. at 907; *Ekenasi,* 271 B.R. at 262. *See also* *Williams,* 296 B.R. at 303; *Vazquez v. United Student Aid Funds (In re Vazquez),* 194 B.R. 677, 680 (Bankr.S.D.Fla.1996). The Court holds that although a debtor is not expected to live in poverty to discharge student loans, where the debtor's income is at, near, or below the federal poverty guidelines, the "minimal standard of living" threshold, and thus the first prong of the Brunner test, is satisfied.[10] In the instant case, the Debtor is living in abject poverty, and has been for several years. The federal poverty guideline for a single person with no dependents in the year 2004 was $ 9,310.00. *Federal Register: Notices,* Volume 69, Number 30, Pages 7335-38 (February 13, 2004). Although the Debtor has failed to provide detailed information regarding his income for 2004, the Debtor's annual income for the past ten years has not exceeded $7,770.00, and averages approximately $4,012.50. This year, the Debtor's income is approximately $2,520.00.[11] *Federal Register: Notices,* Volume 70, Number 33, Pages 8373-75 (February 18, 2005). Clearly his income is below the poverty line. Even without the repayment of student loans, the Debtor cannot afford the basic necessities of life, including food, clothing, and shelter. He is destitute. The Debtor has no ability to repay his student loans and maintain a minimal standard of living, and therefore he has met the first prong of the Brunner test.

As previously noted, most courts hold that the debtor must satisfy all three prongs of the Brunner test to demonstrate undue hardship. *See, e.g.,* *Faish,* 72 F.3d at 306; *Rifino,* 245 F.3d at 1088-89; *Brightful,* 267 F.3d at 328; *Saxman,* 325 F.3d at 1173. In fact, the Brunner test is often strictly interpreted, thereby denying deserving debtors, who are honest and unfortunate, much-needed relief and frustrating the fresh start policy of the Bankruptcy Code. *Polleys,* 356 F.3d at 1308; *Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani),* 311 B.R. 496, 501-02 (Bankr.N.D.Ill.2004), *aff'd,* *Educ. Credit Mgmt. Corp. v. Durrani,* 320 B.R. 357 (N.D.Ill.2005). "Many . . . courts employing the Brunner analysis, however, appear to have constrained the three Brunner requirements to deny discharge under even the most dire circumstances." *Polleys,* 356 842*842 F.3d at 1308. An unduly rigid application of the Brunner test, especially the second and third prongs, may prejudice debtors who are destitute.[12] Where the debtor lives in abject poverty and cannot maintain even a minimal standard of living even without repaying his student loans, flexibility with regard to the last prongs of Brunner may be equitable. *But cf.* *Boykin,* 313 B.R. at 520-21. Nonetheless, the Court will continue its analysis and consider the two remaining prongs of the Brunner test.

The second prong, often referred to as "the additional circumstances test," requires that the debtor present additional circumstances that will prevent him from maintaining a minimal standard of living for a significant portion of the repayment period if obligated to repay student loans. *Cox,* 338 F.3d at 1241. In determining whether the debtor satisfies this prong, the Court must consider two issues: (i) if the debtor has a problem or condition which impairs his ability to work; and (ii) if the problem or condition would persist for a significant portion of the student loan repayment period. *Brown v. Educ. Credit Mgmt. Corp. (In re Brown),* 247 B.R. 228, 234 (Bankr.N.D.Ohio 2000). *See also* *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),* 409 F.3d 677, 681 (6th Cir.2005); *Brightful,* 267 F.3d at 330; *Goulet,* 284 F.3d at 778. Therefore, the problem or condition must interfere with the debtor's ability to obtain and sustain income sufficient to repay a student loan. Generally, courts focus on whether the debtor will be completely unable to pay his student loan debt in the future for reasons beyond his control. "[T]he dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *Roberson,* 999 F.2d at 1136 (quoting *In re Briscoe,* 16 B.R. 128, 131 (Bankr.S.D.N.Y.1981)). Thus the additional circumstances must be significant and ongoing, preventing the debtor from securing and maintaining permanent full-time employment.

It is well-established that physical or psychological disabilities often form the basis of an undue hardship analysis. Such medical conditions are considered under the second prong. Accordingly, the Court must determine whether the debtor's medical condition actually impairs his ability to work, and whether the condition will persist for a significant portion of the repayment period. Substantial credible evidence must be presented to support the existence of such a medical condition. In addition to the debtor's testimony, many courts require the debtor to present corroborating evidence. The *Swinney v. Academic Financial Services (In re Swinney)* case is often relied upon for the proposition that "such evidence does not have to necessarily consist of extensive expert testimony, . . . [but] should consist of more than simply bare allegations; that is, whenever a debtor's health, whether mental or physical, is directly put at issue some corroborating evidence must be given supporting the proponent's position." 266 B.R. 800, 805 (Bankr.N.D.Ohio 2001) (citing Fed.R.Evid. 701). *See* *Norasteh,* 311 B.R. at 678; *Lowe v. ECMC (In re Lowe),* 321 B.R. 852, 860 (Bankr.N.D.Ohio 2004); *Matthews v. Sallie Mae Servicing (In re Matthews),* 324 B.R. 319, 322 (Bankr.N.D.Ohio 2004); *Pobiner v. Educ. Credit Mgmt. Corp. (In re Pobiner),* 309 B.R. 405, 419 (Bankr.E.D.N.Y.2004); *Folsom v. United States Dep't. of Educ. (In re* 843*843 *Folsom),* 315 B.R. 161, 165 (Bankr.M.D.Fla.2004); *Johnson,* 299 B.R. at 681; *Hoskins v. Educ. Credit Mgmt. Corp. (In re Hoskins),* 292 B.R. 883, 887-88 (Bankr.C.D.Ill.2003); *Pace v. Educ. Credit Mgmt. Corp. (In re Pace),* 288 B.R. 788, 792 (Bankr.S.D.Ohio 2003); *Chime v. Suntech Student Loan (In re Chime),*296 B.R. 439, 445 (Bankr.N.D.Ohio 2003); *Siegel v. U.S.A. Group Guarantee Servs. (In re Siegel),* 282 B.R. 629, 635 (Bankr.N.D.Ohio 2002). *See also* *Brosnan v. Am. Educ. Servs. (In re Brosnan),* 323 B.R. 533, 538 (Bankr.M.D.Fla.2005). Medical records which substantiate the debtor's testimony may be sufficient. *Id.;* *Matthews,*324 B.R. at 323; *Johnson,* 299 B.R. at 681; *Hoskins,* 292 B.R. at 888. However, even if the debtor should succeed in having medical records admitted into evidence, some courts have ruled that such records do not establish whether the debtor's condition adversely impacts his future employment. *Burkhead v. United States (In re Burkhead),* 304 B.R. 560 (Bankr.D.Mass.2004) (despite the debtor's 24-page summary of prior medical history to support her hardship claims, the court focused on the debtor's failure to present expert witness testimony about her long-term prognosis); *Ryan v. Dep't of Educ. (In re Ryan),* 310 B.R. 387, 389-390 (Bankr.S.D.Ill.2004) (finding that medical records acknowledging the debtor's various medical problems, but failing to note whether the problems prevented her from working, were insufficient). The general trend seems to be that the evidentiary burden of this second prong prevents *pro* *se* debtors from receiving the relief to which they may be entitled. In fact, one commentator has suggested that the discharge of student loans without expert testimony contravenes the Federal Rules of Evidence, as well as the seminal *Daubert* case and its progeny. Craig Peyton Gaumer, *Use Expert Witness Testimony in Student Loan Hardship Discharge Litigation,* 23-9 Am. Bankr.Inst. L.Rev. 8 (November 2004). *See* *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The author further opines:

. . . based on applicable rules and case law, laypersons are simply not competent to provide guidance to the courts on whether a debtor's physical or mental problems are sufficiently dire, long-term circumstances to justify the entry of a hardship discharge of a student loan. Thus, parties litigating such matters in bankruptcy court should litigate medical hardship discharge cases by consulting appropriate experts, and being prepared to offer such testimony in court.

Id.

The Court realizes that many debtors suffer from financial hardship, and thus the dischargeability of student loans must be based on extreme or unique circumstances. Generally, those debtors who suffer from undue hardship are not in a position to obtain legal counsel, and thus have no choice but to proceed *pro se.* In addition, if debtors are even able to obtain medical treatment, they ordinarily do not have access to private health care. Therefore, it is challenging for debtors to enlist the help of medical professionals, particularly experts, in the prosecution of their case. It is naive to think that debtors can pay these professionals to come to court and testify on their behalf or that they will be able to subpoena such professionals. Moreover, it is difficult, if not impossible, for *pro se* debtors to overcome evidentiary challenges (such as objections to admissibility). The irony is that a debtor who is the most needy cannot afford a fresh start; 844*844 the evidentiary burden of the second prong denies *pro se* debtors much-deserved relief. A few courts have recognized the fundamental nature of this dilemma. In *Norasteh v. Boston Univ. (In re Norasteh),* the court astutely observed:

On the one hand, this debtor, like many, appeared pro se, and lacked the money to pay treating or expert medical professionals to come to court and testify on his behalf. *See* *Doherty v. United Student Aid Funds, Inc. (In re Doherty),* 219 B.R. 665, 669 (Bankr.W.D.N.Y.1998). On the other hand, most judges are lay persons, and require some medical evidence to determine the nature, extent and likely duration of a disability.

311 B.R. 671, 679 (Bankr.S.D.N.Y.2004). Similarly, in *Doherty v. United Student Aid Funds (In re Doherty),* the court acknowledged:

> [I]t is extraordinary for dischargeability litigation that hinges on a debtor's medical condition to actually hinge on medical testimony. This is because all dischargeability litigation involves real persons who are debtors under the Bankruptcy Code, and cannot afford to hire medical experts to testify to the effect of their disease on their disease on their earning capacity. When medical testimony is offered by the debtor it is to lay skepticism to rest, and in this

writer's experience the medical condition of any debtor has never been the subject of dueling experts in § 523(a)(8) litigation.

219 B.R. 665, 669 (Bankr.W.D.N.Y.1998). Yet despite this awareness, courts often hold that the debtor has failed to sustain his burden of proof. *See* *Lowe,* 321 B.R. at 860 (holding "without any substantive evidence to corroborate the Debtor's testimony regarding her medical conditions, the Court must find that the Debtor has failed to sustain her burden under the second prong of the Brunner Test"); *Folsom,* 315 B.R. at 165 (holding that the debtor failed to satisfy the second prong where, "[o]ther than her testimony, [the debtor] presented no evidence that she actually suffers from a medical condition or that it will keep her from full-time employment for a significant portion of the repayment period"). *See also Cianciulli v. Student Loan Mktg. Ass'n (In re Cianciulli),* 2005 Bankr.LEXIS 1129, *13-14 (Bankr.D. Or. June 7, 2005) (despite debtor's testimony regarding Crohn's Disease, ruling that "absent medical evidence that the condition is unremitting and likely to remain so, the Court cannot find that she will be permanently unable to work full-time"); *Burkhead,* 304 B.R. at 565-66 (noting that the debtor failed to call expert witnesses to testify about her long-term prognosis); *Hamilton v. HEMAR Inst. Corp. of Am. (In re Hamilton),* 2003 Bankr.LEXIS 1257, *15-16 (Bankr.D.N.H. June 16, 2003) (finding that corroborating evidence was needed, despite debtor's testimony and three medical reports, to determine the nature of the medical condition, the long-term prognosis, and effect the condition may have on the debtor's employment opportunities).

In the absence of expert testimony, several courts have used judicial notice to engage in medical research to better critique and understand the debtor's medical representations as they relate to the second prong. *Pobiner,* 309 B.R. at 419-20(taking judicial notice of the career prospects of persons suffering from Attention Deficit Hyperactivity Disorder as described in a National Institute of Mental Health publication); *Green v. Sallie Mae (In re Green),* 238 B.R. 727, 735-36 (Bankr.S.D.Ohio 1999) (considering the debtor's employment history as well as taking judicial notice of the employment opportunities for persons suffering from bipolar disorder) (quoting *Doherty,* 219 845*845 B.R. at 670); *Doherty,* 219 B.R. at 670(reviewing medical publications and treatises regarding bipolar disorder and taking judicial notice of the "most probable near-future" for a debtor who suffering from bipolar disorder). A few courts may look to other corroborating evidence such as public assistance. *Thomsen v. Dep't of Educ. (In re Thomsen),* 234 B.R. 506, 513 (Bankr.D.Mont.1999) (noting that VA disability pension payments corroborate debtor's testimony); *Pena,* 155 F.3d at 1114 (noting that debtor's testimony corroborated by a disability award, continuing disability payments, and the letter the debtor of disability payments).

ECMC argues that the Debtor has not presented enough evidence regarding the diagnosis and prognosis of his medical conditions. The Debtor did respond to ECMC's request and filed his Answer to Interrogatories, as well as numerous documents regarding his medical conditions, employment history, and educational background. In fact, ECMC successfully objected to the admission of nearly all of the Debtor's documentation into evidence on the basis of hearsay and lack of foundation. Thus, ECMC used its legal advantage to prevent evidence from being considered. The Court finds that the Debtor used his best efforts to comply with discovery and submit corroborating evidence.

ECMC further argues that the Debtor failed to provide certified medical records, depositions, and/or expert testimony regarding his medical conditions and future earning potential. Claiming that nothing in the record supports that the Debtor is totally disabled and cannot work in the future, ECMC contends that the Debtor did not satisfy the second Brunner prong. ECMC relies on three cases to support its position. ECMC first cites to *Burton v. Pa. Higher Educ. Assistance Agency (In re Burton),* where the debtor failed to provide corroborating medical evidence through expert testimony or depositions. 117 B.R. 167, 170-71 (Bankr.W.D.Pa.1990). The only evidence offered by the debtor was one letter which the court ruled was inadmissible hearsay. *Id.* at 170. This case is distinguishable from the instant case, as the Burton court applied a tripartite test. The Third Circuit did not adopt the Brunner test until 1996, six years later. Moreover, the debtor in *Burton* was represented by counsel who would have been aware of the need and method for properly introducing and authenticating evidence. The Debtor in the case at bar is proceeding *pro se* without knowledge as to the rules and admissibility of evidence. Moreover, the Debtor presented more than just one letter — in fact, numerous documents — to support his position. Although these documents were not admitted into evidence, the Debtor endeavored to provide corroborating evidence to support his testimony.

ECMC also cites to *Folsom v. United States Dep't of Educ. (In re Folsom),* where the court held that the debtor must present corroborating evidence, although not necessarily expert testimony, to support his position beyond bare allegations. 315 B.R. 161, 165 (Bankr.M.D.Fla.2004). Once again, the debtor in *Folsom* was represented by counsel whereas the Debtor in the instant case is proceeding *pro se.* Moreover, that debtor presented no evidence that she actually suffered from various medical conditions or that those conditions would prevent her from full-time employment, while the Debtor here has attempted to submit numerous documents to the Court. In addition, the debtor in *Folsom* completed both a bachelor's and master's degree and did not seek employment the year before the trial. The Debtor in the case at bar has not received his degree and has continually tried to find employment through odd 846*846 jobs and labor pools. The third case ECMC relies upon is *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful),* contending that the Court cannot rely solely on the Debtor's testimony regarding his medical conditions; corroborating evidence, including expert testimony, must be provided. 267 F.3d 324 (3d Cir.2001). However, ECMC has misconstrued the Third Circuit's ruling. The appellate court stated that findings regarding the debtor's mental and physical conditions do *not* require expert testimony and could be made solely on the basis of the debtor's testimony:

It was appropriate for the Bankruptcy Court, as the trier of fact, to assess [the debtor's] testimony and draw reasonable conclusions regarding her mental and emotional state. *E.g., In re Cline,* 248 B.R. 347, 350 (8th Cir. BAP 2000) (explaining that "there is no reason to view the trial court's findings [regarding the debtor's emotional state] as unreliable merely because no expert evidence was introduced").

What is missing from the Bankruptcy Court's analysis, however, is any discussion of the nature of [debtor's] emotional and psychiatric problems, or how these problems prevent her from being gainfully employed. The Bankruptcy Court seems to have merely assumed that Brightful's emotional and psychiatric problems would automatically preclude her from holding full-time employment. . . .

Brightful, 267 F.3d at 330. Unlike in *Brightful,* in the instant case the Debtor has testified as to how his mental and physical conditions affect his ability to be employed.

Finally, ECMC argues that, according to *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),* the Debtor must present corroborating medical evidence other than unauthenticated letters. 409 F.3d 677, 681 (6th Cir.2005). The Sixth Circuit held that there was no expert testimony corroborating the debtor's claims and that the debtor's testimony was not sufficient. *Id.* However, the appellate court emphasized the lack of evidence put forth by the debtor to establish that her disabilities precluded her from obtaining and maintaining gainful employment. *Id.* at 681-82. In the instant case, the Debtor has testified that his physical and medical conditions prevent him from future employment. Moreover, the Debtor presented more than just his testimony. Furthermore, the debtor in *Tirch* was represented by counsel whereas the Debtor in the case at bar is proceeding *pro se* and cannot overcome the evidentiary obstacles. In addition, there are significant factual differences between the two cases, as the Debtor in *Tirch* received both a bachelor's and master's degree and stopped working before filing bankruptcy.

The Court rules that the cases relied upon by ECMC are not controlling, nor applicable, to the instant case. The Court also holds that the Debtor's testimony is credible and genuine. The Debtor explained how his emotional and physical problems adversely impacted his ability to work. The Debtor also articulated how these conditions would impair his full-time employment in the future. Moreover, the Debtor attempted to offer corroborating evidence in the form of letters from the V.A. and various healthcare providers. However, the Debtor, without any legal education, training, or assistance, was unable to challenge ECMC's objections. Nonetheless, the Debtor's testimony regarding his physical and emotional ailments was sufficient to show that these conditions have prevented him from being gainfully employed and will interfere with employment for a significant portion of the 847*847 repayment period. Accordingly, the Debtor has satisfied the second prong of the Brunner test. The Court carefully considered the debtor's testimony and determined that there is a basis for the conclusion that the debtor's medical condition constitutes the "additional circumstances" contemplated by the Brunner test.[13]

Under the **third prong of the Brunner test**, a debtor must show that he has made a good faith effort to repay student loans. *Cox,* 338 F.3d at 1241. The debtor must demonstrate that he is repaying the loan if he is in the position to do so. *Ulm,* 304 B.R. at 922. However, even if the debtor has not made payments, the Court must continue the good faith inquiry. *Polleys,* 356 F.3d at 1311 ("the failure to make a payment, standing alone, does not establish a lack of good faith"). "A finding of good faith . . . turns on several considerations including the debtor's efforts to obtain employment, maximize his income, minimize his expenses, and participate in alternative repayment options." *Norasteh,* 311 B.R. at 676 (citing *Pobiner v. Educ. Credit Mgmt. Corp. (In re Pobiner),* 309 B.R. 405, 420-21 (Bankr.E.D.N.Y.2004);*Pace v. Educ. Credit Mgmt. Corp. (In re Pace),* 288 B.R. 788, 793 (Bankr.S.D.Ohio 2003); *Chambers v. Nat'l Payment Ctr. (In re Chambers),* 239 B.R. 767, 770 (Bankr.N.D.Ohio 1999); *Douglass v. Great Lakes Higher Educ. Servicing Corp. (In re Douglass),* 237 B.R. 652, 657 (Bankr.N.D.Ohio 1999)). Moreover, the debtor bears the burden of proving that his failure to make payments results from factors "beyond his reasonable control." *Roberson,* 999 F.2d at 1136; *Brunner II,* 46 B.R. at 756. In the instant case, the Debtor has not repaid any of his student loans. The Debtor lives in abject poverty, and does not have the ability to make any student loan payments due to circumstances beyond his control. The Debtor has demonstrated that he suffers from various ailments including depression, anxiety, hypertension, and chronic back pain. These medical conditions prevent him from obtaining and maintaining employment. Moreover, the Debtor has endeavored to resolve his student loan obligations through inquiries with the United States Department of Education, the Georgia Student Finance Commission, the V.A., and his congressman, Senator Zell Miller. *See* Plaintiff's Exhibits 2A-2G.[14] The Court concludes that the Debtor has not been able to repay his student loans, and thus has satisfied the third prong of the Brunner test. Once again, this inquiry seems counterintuitive when applied to this case where the Debtor lives in abject poverty. As one court has noted, "[i]s being poor bad faith? Surely not. If [the debtor] does not have enough money to pay the student loan, [he] cannot be considered to be acting in bad faith if [he] does not pay that loan. This logical conclusion alone supports dischargeability." *Rutherford v. William D. Ford Direct Loan Program (In re Rutherford),* 317 B.R. 865, 880 (Bankr.N.D.Ala.2004).

V. CONCLUSION

The Court previously found that the Debtor satisfied the Brunner factors, and has set forth its reasoning more fully in this opinion. The Court rules that excepting 848*848 the Debtor's student loan debt from his discharge will impose an undue hardship on him. Accordingly,

IT IS ORDERED that the Debtor is granted an "undue hardship" discharge and the debts owed to ECMC are hereby dischargeable pursuant to section 523(a)(8) of the Bankruptcy Code.

IT IS FURTHER ORDERED that judgment be and is hereby entered in favor of the Debtor and against ECMC.

The Clerk's Office is directed to serve a copy of this Order upon the Debtor, Counsel for ECMC, the Defendants, and the Chapter 7 Trustee.

[1] The Debtor also obtained a Federal Perkins Loan in the approximate amount of $1,585.00 from ASU and/or the General Revenue Corporation.

[2] It appears that the Debtor suffered a lumbosacral sprain.

[3] The Debtor did not file amendments to the Schedules or Statement of Financial Affairs, which were originally filed in 1999.

[4] The Debtor has filed an appeal with the V.A. to increase the amount of his disability compensation.

[5] It appears that the Debtor may have defaulted on his Perkins loan in February of 1995.

[6] On December 3, 2004, ECMC filed the Motion for Order Compelling Discovery (the "Motion to Compel") (Doc. No. 23), claiming that the Debtor did not provide complete responses to the Interrogatories. Apparently ECMC wrote several letters to the Debtor regarding this matter, and the Debtor failed to respond or address these discovery issues. ECMC requested that the Court (i) dismiss the Complaint, (ii) award attorney's fees for the Debtor's failure to contact ECMC, and (iii) issue an order compelling the Debtor to respond to the discovery. On February 8, 2005, the Court entered the Order (Doc. No. 25) granting the Motion to Compel and instructing the Debtor to supplement his responses to the Interrogatories and provide the requested documentation. On March 18, 2005, ECMC filed the Motion for Sanctions for Plaintiff's Failure to Comply with Order Compelling Discovery (the "Motion for Sanctions") (Doc. No. 34). ECMC maintains that the Debtor has failed to comply with the Order granting the Motion to Compel by failing to supplement his responses to the Interrogatories or provide the requested

documentation. ECMC requested that the Court dismiss the Complaint pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure and award attorney's fees in an amount no less than $350.00.

[7] Other courts have applied the totality of circumstances test. *See, e.g., Long v. Educ. Credit Mgmt. Corp. (In re Long),* 322 F.3d 549, 553 (8th Cir.2003) (rejecting Brunner test and embracing test enumerated in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews),* 661 F.2d 702 (8th Cir.1981)).

[8] The Sixth Circuit has applied, but not exclusively adopted, the Brunner test, *Miller v. Pa. Higher Educ. Assistance Agency,* 377 F.3d 616 (6th Cir.2004); *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman),* 25 F.3d 356 (6th Cir.1994), *cert. denied,* 513 U.S. 1081, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995); *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby),* 144 F.3d 433, 437 (6th Cir.1998).

[9] These guidelines are used for administrative purposes such as determining financial eligibility for federal assistance programs. *See http://aspe.hhs.gov/poverty/05poverty.shtml.* Courts generally take judicial notice of these guidelines. *See* Rule 201(b) of the Federal Rules of Evidence.

[10] The Court does *not* adopt the Department of Health and Human Services' poverty guidelines as the minimal standard of living. *See Rutherford v. William D. Ford Direct Loan Program (In re Rutherford),* 317 B.R. 865 (Bankr.N.D.Ala.2004); *Ivory v. United States (In re Ivory),* 269 B.R. 890 (Bankr.N.D.Ala.2001).

[11] The federal poverty guideline for a single person with no dependents is $ 9,570.00 this year.

[12] These debtors cannot afford representation, and thus cannot overcome evidentiary burden of the second prong. Moreover, these debtors cannot make good faith efforts to pay their loans as required by the third prong.

[13] In future cases, the Court could conceivably retain its own expert pursuant to Rule 706(b) of the Federal Rules of Evidence and apportion the cost as appropriate between the parties. *See* Craig Peyton Gaumer, *Use Expert Witness Testimony in Student Loan Hardship Discharge Litigation,* 23-9 Am. Bankr.Inst. L.Rev. 8, 50 (November 2004).

[14] There is a dearth of information as to whether the Debtor and ECMC explored alternative repayment options, deferment, or forbearance.

D.C. Circuit

According to In Re Zook, below, the D.C. Circuit has adopted a "modified" version of the Brunner test. We were unable to find authority for that position, and *Zook* is poorly reasoned in our opinion. Nevertheless, it's a starting point for anyone in D.C.

IN RE ZOOK, Bankr. Court 2009

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In re PAMELA S. ZOOK, Chapter 7, Debtor
PAMELA S. ZOOK, Plaintiff,
v.
EDFINANCIAL CORP., et al., Defendants.

Case No. 05-00083, Adversary Proceeding No. 05-10019.

United States Bankruptcy Court, D. Columbia.

February 27, 2009.

MEMORANDUM DECISION

S. MARTIN TEEL Jr., Bankruptcy Judge

The plaintiff, Pamela S. Zook, filed a complaint seeking to have her student loan debts discharged. This decision, constituting the court's findings of fact and conclusions of law, concludes that Zook is entitled to have the debts discharged. Zook has proceeded in good faith to attempt to pay her student loan debts, but due to a medical condition beyond her control she is and will be unable to pay them if she is to address her medical condition appropriately and to maintain a minimal standard of living. Zook suffers from a severe bipolar affective disorder that interferes with her capacity to function at work and otherwise, and that leads to periodic severe episodes of depression during which she is essentially unable to function at all. This leaves her unable to earn an income at a level that will permit her to maintain a minimal standard of living and make payments on the student loan debt. Accordingly, as discussed in greater detail below, the debts are dischargeable pursuant to 11 U.S.C. § 523(a)(8) as imposing an undue hardship on Zook.

I

Student loan debts of the types involved in this case are nondischargeable "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). The majority of courts, including this one, have adopted some form of the "undue hardship" standard as defined in *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987).[1] To prove an undue hardship, the *Brunner* standard requires that a debtor show three things:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist

indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396. I agree with *In re Polleys,* 356 F.3d at 1309, that "the good faith portion of the *Brunner* test should consider whether the debtor is acting in good faith in seeking the discharge, or whether he is intentionally creating his hardship." A court must find in favor of the debtor on all three inquiries to discharge the education loan. *Brunner,* 831 F.2d at 396.

The other notable "undue hardship" standard is the totality-of-the-circumstances standard, which has been adopted by the United States Court of Appeals for the Eight Circuit. *In re Long,* 322 F.3d 549 (8th Cir. 2003).[2] *Accord, In re Andresen,* 232 B.R. 127, 140 (B.A.P. 8th Cir. 1999). I conclude that the *Brunner* test generally sets forth the more appropriate test for reasons discussed in *In re Polleys,* 356 F.3d at 1308-09. I will apply the *Brunner* test, but there are no facts or circumstances that would alter the outcome under the "totality-of-the-circumstances" test. Under either test, Zook has established that the debts here are dischargeable.

As I have opined in the past, there are three qualifications to the *Brunner* test. None of those qualifications alter the outcome here.

First, *Brunner* is not an all-or-nothing proposition. If the debtor will have the ability to pay part of the debt in the future, applying the *Brunner* test to that part of the debt ought to make it nondischargeable.

Second, if the debtor is currently unable to pay the debt and the *Brunner* test is otherwise met except that the debtor has shown a future inability to pay for only a finite period, the debt ought to be dischargeable during that finite period. In other words, if a debtor fails only the second *Brunner* requirement because after the passage of a finite period of time he likely will be able to pay the debt, he should not be discharged from the loan *in toto* because future prospects indicate he may be able to repay it later; in such a case, a deferral of payment (a temporary discharge of the debt) is the appropriate remedy.

Finally, limiting the forecast of the debtor's inability to pay to "a significant portion of the repayment period of the student loans," as mandated by *Brunner,* is obsolete. The current version of § 523(a)(8) makes no provision for a student loan debt to become dischargeable, without a showing of undue hardship, after the passage of a set number of years. The version of § 523(a)(8) that applied in *Brunner* made the student loans dischargeable after five years (without a showing of undue hardship), and it is that five-year period that *Brunner* must have had in mind. *See In re Polleys,*356 F.3d at 1307 n.2. It makes no sense, for example, that if the remaining repayment term for a student loan is only one year, the debt can escape discharge even though the record demonstrates that in three years the debtor will have the ability to pay the entire debt. Indeed, *Brunner* itself recognized that the forecast of future inability to pay should be over an extended period of time. *See In re Brunner,*831 F.2d at 396 ("Requiring evidence not only of current inability to pay but also of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time, more reliably guarantees that the hardship presented is `undue.'"). I agree with *In re Polleys* that "the inquiry into future circumstances should be limited to the foreseeable future" (which equates to the extended period of time that *Brunner* envisioned), but I disagree with its observation, in dicta, that the foreseeable future should be "at most over the term of the loan." *In re Polleys,* 356 F.3d at 1310 (citation omitted).

II

Starting in 1989, Zook attended the University of Texas to study for an undergraduate degree. In her sophomore year, Zook withdrew from the university while suffering from an onset of severe depression, and had to be cared for by her father. Four years later, she re-enrolled at the University of Texas and completed her undergraduate degree in 1997. During 1998 to 2000, she took pre-med courses at the same university.

In August 1994, she took out her first student loan to finance her education at the University of Texas. She took out additional student loans in 1995 and 1999 for that purpose.

Beyond the student loans incurred in attending the University of Texas that Zook seeks to discharge, Zook incurred additional student loan debts in attending medical school. Zook was admitted to Georgetown University School of Medicine and began attending that school in the fall of 2001. She took out the remaining student loans at issue here in 2001 and 2002 to finance that education.

During her first semester in medical school, she took a leave of absence due to her depression. She began anew in 2002, but each semester she failed one-third of her courses and was unable to successfully stay in medical school due to recurring periods of depression. During a portion of that period, Zook was homeless because she was unable to sustain employment in her depressive state.

III

As established by the testimony of Dr. Todd S. Cox, who testified as an expert and also as Zook's treating physician, Zook suffers from bipolar affective disorder. Zook suffers from a severity of the disease that is rare. This disorder manifests itself in a variety of ways, including changes in mood, in energy and motivation, in sleep and appetite, and in self-image and processing one's environment. She suffers from a lack of self-worth, due in part to her inability to complete her medical education. The student loan debts hanging over her head are a reminder of that inability.

Zook's depressive state manifests itself in a complete lack of motivation and energy, an inability to focus, and a feeling of intense hopelessness. During periods of severe depression, Zook struggles with even basic functioning and is unable to fulfill day-to-day activities. During the last such episode, her depression was severe and required full-time hospitalization. At one point she suffered an episode during which she received electroshock therapy, a treatment that is reserved for the most severe cases. Zook requires an array of prescription medications to address her disease (and the services of a prescribing physician), but because the disease is not curable, she requires psychotherapy as an additional necessary component of treating her disease.

Her depressive episodes are particularly difficult for Zook because Zook lacks a support network of family or close friends who could assist her in functioning through her depressive periods. As a result, Zook is unable to maintain any aspect of her life during these periods, and must start her professional and personal life over after each episode, and her recuperative phase after such an episode takes longer than for a patient with greater supports.

At the time of the trial, Zook was currently in a recovery period from a depressive episode that lasted about a year and a half. Zook's bipolar condition cannot be cured; her treatment is an attempt to educate her on how to better manage her condition and avoid triggers in her life which will increase the likelihood or severity of a depressive episode. Zook's primary triggers include her failure in medical school, her loans (which are tied to her failure in medical school), and her fear that she will become homeless again when she has another depressive episode and is unable to work. Her inability to afford the full extent of the treatment she needs due to her financial condition similarly leads to stress that can be a trigger for severe episodes of depression.

Although it is impossible to predict the future for any given patient, based upon statistics of patients suffering from a bipolar disorder, it is highly likely and almost guaranteed that Zook will have future episodes of severe depression. As Zook gets older, her condition will become more severe, and thus depressive episodes will be more frequent and more severe, and the periods of time during which she will be well will be shorter.

Even in her current condition (of recovering from and not being in the midst of a severe depressive episode), Zook is unable to function in a normal way. She is unable to cook for herself other than spaghetti, TV dinners, and microwaved foods, adding to her at-home and at-work food expenses. Her medications cause her fatigue; she suffers from extreme concentration difficulties; and her memory and word finding abilities are impaired.

Her ability to stay in jobs in the past has been miserable. For example, she failed as a bookseller at a retail book store, and she failed as a telephone receptionist at another company. She performs poorly in her current position: she acknowledges that she has difficulty following directions, she often tunes out, and she gets yelled at. Because of her illness, she occasionally misses work and has a lot of unpaid leave. Given her lack of capacity to function at a high level, it is amazing that she is still employed.

Zook's disease makes it difficult for her to develop friendships, to develop relationships, and to live with others. For days and weeks on end she often has a feeling of a need to stay at home and not venture out.

In addition to bipolar affective disorder, Zook also suffers from Ehlers-Danlos Syndrome (a genetic, connective tissue disorder), asthma, and allergies. When she suffers sinus infections, that can worsen her ability to cope with her bipolar affective disorder.

IV

As previously stated, under the *Brunner* standard, a debtor must show that (1) he or she cannot maintain a "minimal" standard of living if forced to pay the education loans; (2) additional circumstances exist such that for an extended period of time he or she will be unable to repay the loans in the future; and, (3) he or she has made good faith efforts to repay the loans. *See* *Polleys,* 356 F.3d at 1309-10; *Brunner,* 831 F.2d at 396.

A.

MAINTENANCE OF A "MINIMAL" STANDARD OF LIVING

The first *Brunner* inquiry is whether the debtor currently lacks the financial means and ability to repay the education debt while maintaining a minimal standard of living for him or herself. *See* *Polleys,* 356 F.3d at 1309-10; *Brunner,* 831 F.2d at 396. This inquiry requires consideration of the amount of the debtor's education loan payments; the debtor's current income; and household, medical, and other expenses, and the reasonableness of those expenses. The debtor need not live in poverty in order to satisfy the first inquiry, but neither is the debtor sheltered from making some personal and financial sacrifices in order to repay the debt. *See, e.g., In re Howe,* 319 B.R. 886, 889-90 (B.A.P. 9th Cir. 2005); *In re Faish,* 72 F.3d 298, 305 (3d Cir. 1995); *In re Kelly,* 351 B.R. 45, 53 (Bankr. E.D.N.Y. 2006). Put another way, "a minimal standard of living is a measure of comfort, supported by a level of income, sufficient to pay the costs of specific items recognized by both subjective and objective criteria as basic necessities." *Ivory v. United States (In re Ivory),* 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001).

The defendants are Texas Guaranteed Student Loan Corp. ("TGSLC") and Educational Credit Management Corporation ("ECMC") (collectively, "Defendants"). Zook owes TGSLC $27,595.65 as of January 17, 2006, as debt she incurred prior to medical school. (Trial Exhibit M, p. 4.) Zook owes ECMC $44,861.19 as of October 3, 2006, as debt incurred during medical school. (Defendants' Post Trial Memorandum, DE No. 49, p. 3.) At the April 23, 2007 trial, Zook testified that she owed approximately $76,000 total (the sum of the TGSLC and ECMC debts). At an interest rate of 7.14% per annum,[3] a $76,000 debt would increase by $5,426.40 the first year, and would continue to increase.

Zook's gross salary in 2007, up to and including the date of trial (April 23, 2007), was $60,486.48 annually, or $5040.54 per month. (Direct Deposit Advice Slip, dated March 26, 2007, Trial Exhibit O.) This equates to a monthly net income of $3,469.62. (*Id.*) Zook had been receiving approximately $860 per month in Social Security disability benefits, but she received correspondence from the Social Security Administration that she would no longer receive that money because she had maintained employment for a fifteen month period.

In 2006, Zook earned $54,219 salary from employment, and received $7,902 in social security benefits. (Form 1040, U.S. Individual Income Tax Return — 2006, Trial Exhibit N.) But in previous years, Zook's employment was sporadic. Zook reported gross income of $11,893 in 2004; $11.00 in 2003; $715 in 2002; $29,337.00 in 2001; and, $15,710 in 2000. (Zook's Response to Interrogatories, Trial Exhibit K, p. 8.) Zook's reported gross income for 2005 was not put into evidence. But in 2005, Zook earned monthly gross income of only $960 as a technical writer until July 11, 2005. She was unemployed from July 11, 2005 to November 2005, and became unemployed again in December 2005.

The amount of Zook's total monthly expenses are in dispute. At the trial, Zook quantified the following monthly expenses:

Rent:	$1,187
Electricity:	75
Therapy sessions with Dr. Todd Cox:	280
Groceries, laundry, eating in restaurants:	600
Medications and supplements	400
Cellular telephone service	35
Cable television, internet, and home telephone service	140
Automobile insurance	120

Renter's insurance	30
Entertainment expenses	50
Cat food	10
Gasoline	150
Clothing	150
Total Monthly Expenses:	$3,227

Defendants have put forth a considerably lower estimate of $2,432. (DE No. 49, p. 5.) Upon review, it is clear that Defendants' lower estimate understates or does not include several necessary expenses.

First, Defendants do not include the $280 per month for therapy sessions with Dr. Cox. Zook testified that she sees Dr. Cox twice a month, and Dr. Cox charges $200 per hour, with insurance covering only $60 per hour. Zook did not make clear how long each session with Dr. Cox lasts, but assuming that each session is only an hour, two meetings a month would cost Zook $280. Due to her severe bipolar disorder, the cost for therapy is a necessary expense for even a minimal standard of living.

Second, Defendants afforded only $35.00 (in medicare and insurance co-payments) for Zook's *prescription* medications. (DE No. 5, p. 5.) However, Zook testified she also takes numerous non-prescription medications, as well as vitamin and herbal supplements. Zook testified these supplements were taken to attempt to reverse some of the memory loss Zook suffered from electroshock therapy, given as treatment for her depression; and, for Ehlers-Danlos Syndrome. Zook's efforts to recover and preserve her health constitute necessary expenses.

Third, Defendants listed Zook's entertainment expenses as $35 (DE No. 49, p. 5), although they elicited from Zook an estimate of $50 during her testimony. Zook had testified that she spent $15 per month for Netflix (a home-delivery movie service), and purchased three crossword puzzle books and one other book per month, at approximately $15 per book. That itemization would result in $75 per month, although I have used the more conservative and very reasonable estimate of $50 in its calculation above, as Zook agreed to that estimate during her testimony.

Fourth, Defendants listed no expenses for clothing (*see* DE No. 49, p. 5). A minimal standard of living requires possession of decent clothing and footwear, which will need to be replaced from time to time. *See* *In re Douglas,* 366 B.R. 241, 253 (Bankr. M.D. Ga. 2007) (citing *In re Ivory,* 269 B.R. at 899). This expense includes clothing and footwear for both work and non-work settings, and $150 per month is not an unreasonable amount with which to procure those items.

Based upon these omissions and overly low estimations, I reject Defendants' estimate of $2,432.

The list above, enumerating the expenses quantified by Zook at trial and resulting in a monthly budget of $3,227, would yield a monthly surplus of $242.62 (*i.e.,* $3,469.62 in income minus $3,227 in expenses). However, the $3,227 budget neglects to include several additional expenses, which Zook discussed during her testimony but was unable to precisely quantify. Upon considering those additional expenses, as below, no surplus remains, and Zook's income is inadequate to cover her expenses.

First, Zook's therapy costs are understated. Zook has already tightened her budget by seeing Dr. Cox only twice a month, rather than seeing him once a week, as she had done previously. Zook testified this was not due to any change in her condition, but rather because she was unable to afford visiting Dr. Cox once a week. Were she to visit him once a week as she had previously, costing an additional $280 per month, the monthly surplus would already be exhausted. Furthermore, Zook testified favorably of her work with an occupational therapist, who also served as a life coach. However, she ceased her visits with her occupational therapist due to financial limitations. Due to the seriousness of her bipolar disorder and the severity of damage that a period of depression causes, these medical expenses are properly considered a part of a minimal standard of living for Zook.

Second, in addition to bipolar affective disorder, Zook also suffers from Ehlers-Danlos Syndrome, asthma, and allergies. Zook testified that she sees an allergist and an ear, nose, and throat specialist; however, there is no budgeting for any routine or emergency visits.

Zook reserves $125 per month, pre-tax, from her salary for medical expenses and places it in a MedFlex account. (*See* Trial Exhibit O.) This $125 per month is not calculated in her net monthly income of $3,469.62. However, that amount does little to displace Zook's budgeted $680 of medical services, medicines, and supplements, or the additional expenses described above. Indeed, the $125 would not pay for an hour of therapy from Dr. Cox.

Third, Zook owns a 1998 Toyota Camry. Zook testified that the car requires $2,000 to $2,500 in repairs to its electrical system; $200 to $250 to replace a headlight cover; and, an additional amount to refit the right side mirror. Zook testified, based upon her home and work locations, she is unable to take public transit to work. Any maintenance required on the automobile is a necessary expense, and would quickly consume in excess of her budgetary surplus under the $3,227 budget.

Fourth, Zook should be afforded some budgetary leeway to save funds for emergencies. Other courts have recognized the appropriateness of inclusion of a reasonable amount for emergency spending. *See, e.g., In re Douglas,* 366 B.R. at 254 (recognizing a lack of budgeting for emergency expenses was a factor that indicated debtor's budget was "extremely limited and bare."). In Zook's case, such a fund is particularly warranted. Zook has no credit cards and no stable network of support from family or close friends. If she were to lose her job and were unable to secure employment that included health insurance, her medical bills would increase drastically (her $400 monthly estimate for medications and supplement would increase to at least $1,200 without health insurance and medicare). A minimal standard of living should provide some continuity, and Zook should not be rendered homeless or precluded from necessary medical care or prescriptions should she have a break in employment. This risk of unemployment is more than a mere possibility. The severity of Zook's bipolar disorder will increase as she ages, and a relapse of her depressive state at some point is, statistically, almost guaranteed. Moreover, Zook's disease impairs her ability to function well at work even when she is not suffering an episode of severe depression, and it is quite surprising that she has been able to hold onto her current employment as long as she has.

Defendants point to Zook's savings of $5,000 as evidence she was not maintaining a minimal standard of living, arguing she was saving up to $400 per month. A majority of those savings would be consumed due to Zook's owing approximately $2,000 in federal income tax from 2005 and 2006, and owing over $2,500 for oral surgery she required due to a congenital condition. Such expenses provide a clear example why Zook should be permitted some ability to save for unexpected or unbudgeted expenses.

In arguing that Zook ought not be allowed to save, Defendants cite *Nash v. Conn. Student Loan Found. (In re Nash),* 446 F.3d 188, 194 (1st Cir. 2006); *Paul v. Suffolk Univ. (In re Paul),* 337 B.R. 730, 737 (Bankr. D. Mass. 2006); and *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish),* 72 F.3d 298, 307 (3d Cir. 1995). But as Defendants acknowledge, a debtor need only show that expenses are reasonably necessary, citing *In re Savage,* 311 B.R. 835, 841 (B.A.P. 1st Cir. 2004), and *In re Webb,* 262 B.R. 685 (Bankr. E.D. Tex. 2001). Zook has shown that her savings *are* both reasonable and necessary to maintain a reserve to meet practically inevitable hard times in the future.

Defendants also point to two categories of what they consider expenditure on luxury items that they contend demonstrate that Zook has an ability to make some repayment of her debts. They criticize, first, her expenditure of $600 per month on food. Defendants cite *In re Mandala,* 310 B.R. 213, 218 (Bankr. D. Kan. 2004), in support of this criticism, but that decision is distinguishable. As noted previously, that high expenditure is necessitated in part by Zook's inability to cope with the basic life skill of preparing her own meals from scratch, and part of that expense is not for groceries at home but for lunch at work. Moreover, as discussed later in regard to both this and the second category of expenditures that Defendants criticize, merely establishing that the level of a particular expenditure exceeds what a frugal individual would spend does not alone carry the day for Defendants.

Defendants criticize, second, Zook's telephone, cable and entertainment expenditures as being at a high level. In support of this argument, Defendants cite *In re Miller,* 377 F.3d 616, 623-24 (6th Cir. 2004); *Mandala v. Educ. Credit Mgmt. Corp.,* 310 B.R. 213 (D. Kan. 2004); *Commonwealth of Virginia State Educ. Assistance Auth. v. Dillon,* 189 B.R. 382 (Bankr. W.D. Va. 1995); *In re Wardlow,* 167 B.R. 148, 151 (Bankr. W.D. Mo. 1993); *In re Hornsby,* 242 B.R. 647, 652-53 (Bankr. W.D. Tenn. 1999); *In re East,* 270 B.R. 485, 494 (Bankr. E.D. Cal. 2001); *Educ. Credit Mgmt. Corp. v. Buchanan,* 276 B.R. 744, 751-52 (N.D. W. Va. 2002); *In re Pincus,* 280 B.R. 303, 317-18 (Bankr. S.D.N.Y. 2002); and *In re Perkins,* 318 B.R. 300, 309 (Bankr. M.D.N.C. 2004). But those decisions are distinguishable as discussed below.

As noted above, Zook spends $50 per month on miscellaneous entertainment and she spends $35 on cellular telephone service and $140 on cable television, internet, and home telephone service. A debtor is entitled under the minimal standard of living test to incur some modicum of expenditures on telephone and entertainment. *See* *McLaney v. Ky. Higher Educ. Assistance Auth. (In re McLaney),* 375 B.R. 666, 674 (M.D. Ala. 2007) ("Even under the minimal standard of living test, `[p]eople must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.'" (quoting *In re Ivory,* 269 B.R. at 899)). Given Zook's mental disease, which makes it difficult for her to venture out from her apartment, and her inability to readily socialize, this level of expenditures on these types of items is not unreasonable.[4] It is noted, moreover, that by being a secluded individual, Zook minimizes or eliminates amounts she might otherwise spend on such things as dinner out, movie theaters, or discretionary driving.

Even if these expenditures (on food, telephone, cable, and entertainment), at this level, and viewed in isolation, were not necessary to maintain a minimal standard of living, Zook's overall expenditures are at a level consistent with maintaining a minimal standard of living. In other words, these expenditures, even if viewed as unreasonably high, represent amounts that should be devoted to other expenses that *are* necessities and that are not being met: a higher level of medical care, and a reserve for practically inevitable future hard times. Zook deprives herself of meeting her necessities if she is indeed failing to act frugally by not reducing her expenditures on food and entertainment to a lower level (and by not eliminating some of them, like cable). As observed in *In re McLaney,* 375 B.R. at 676, "as a court examines a debtor's expense budget as a whole, it is appropriate for a court to take into account reasonably necessary items that are omitted, thereby creating, in the words of the bankruptcy court, `an austere and even understated expense budget.'" (Citations omitted.) Given Zook's lack of capacity to function well in life, it is not surprising that she may not be a paradigm of frugality.

The decisions Defendants cite in support of their criticism of the level of Zook's expenditures on food and on telephone, cable, and entertainment are distinguishable. The debtors in those cases were not failing to attain an income sufficient to meet the level of expenditures required (1) appropriately to address unique needs arising from the debtor's suffering from a severe, incurable, and chronic medical condition and (2) to meet as well other expenditures necessary to maintain a minimal standard of living. This, then, is like such cases as *In re Douglas,* 366 B.R. at 253-54 ("Debtor's other necessary expenses still exceed her income by several hundred dollars even without the inclusion of the cable television and modem service expense.").

By the Defendants' logic, a debtor living well below the poverty level would be denied a discharge if the debtor, by foregoing a reasonable level of expenditure on clothing, spent part of his income on what would be considered luxury items, for example, cable or going out to dinner. A debtor whose income is insufficient to meet a minimal standard of living, taking into account the level of expenditures necessary for that purpose, ought not be denied a discharge of student loan debts based on the creditor's finding some item of expenditure that could be deemed a non-necessity. The *Brunner* test ought not be turned in that fashion into a game of "gotcha" based on viewing certain expenditures in isolation, wearing blinders that disregard the debtor's needs in a global fashion.

Based upon Zook's budget, her monthly income of $3,469.62 and $125 monthly pre-tax medical flex account savings is inadequate to pay for her basic month-to-month necessities, including necessary health care, medications, and supplements, and does not permit her the opportunity to save funds to meet another necessity—setting aside a reserve to weather the high likelihood of future periods of depression, and loss of income, caused by her bipolar disorder. As such, Zook lacks the ability to maintain a minimal standard of living if she were also required to repay her education loans.

B.

FUTURE ABILITY TO PAY

The next inquiry is whether there are any additional circumstances that indicate the debtor will not be able to make such payments in the foreseeable future. *See* *Polleys,*356 F.3d at 1310; *Brunner,* 831 F.2d at 396. This requires consideration of any additional circumstances which will persist, or are likely to arise, which would prevent the debtor from securing adequate shelter, nutrition, health care, and similar necessities. *Polleys,* 356 F.3d at 1310*.*

Here, Zook suffers from a severe bipolar affective disorder, which will only become more difficult to manage as she ages. Although Zook made approximately $55,000 in 2006 and received a $5,000 raise in

2007, Zook's work history, coupled with consideration of her condition, indicates her current salary is unlikely to continue. *See* *Barrett v. Educ. Credit Mgmt. Corp.,* 487 F.3d 353, 360 (6th Cir. 2007) (citing *In re Cheesman,* 25 F.3d 356, 360 (6th Cir. 1994)) ("[A] debtor's work history is a relevant and significant consideration in projecting whether a debtor's current state of affairs is likely to persist.")

Zook's previous employment, or lack thereof, yielded income as follows: $11,893 in 2004; $11.00 in 2003; $715 in 2002; $29,337.00 in 2001; and, $15,710 in 2000. (Trial Exhibit K, p. 8). None of these years even approach her 2007 salary of approximately $60,000.

The pattern in Zook's income history is explained by the state at any given time of her bipolar affective disorder. Zook's disorder is characterized by periods of significant to moderate effectiveness, followed by periods of depression in which Zook is unable to care for herself. This fluctuation is evident in Zook's income history.

According to Dr. Cox, although Zook can develop some ability to manage her condition, the very nature of her condition indicates it will become more difficult to manage as she ages and will involve relapses into depressive states. Although a general risk of future unemployment does not negate a future ability to pay, here there is a specific risk of future unemployment. Dr. Cox's testimony and Zook's history of inconsistent employment and fluctuating periods of functionality convincingly demonstrate that Zook's current finances will not substantially improve in the foreseeable future, and that there is a specific risk of periodic unemployment due to her bipolar condition. This all indicates her finances will in all likelihood be drastically less favorable from time to time.[5]

Defendants urge that Zook can pay currently and through the foreseeable future if she were compelled to enroll in the Income Contingent Repayment Program ("ICRP"), and specifically under the ICRP option of making a monthly payment for 25 years of "20% of the borrower's discretionary income, which is defined as the borrower's adjusted gross income minus the poverty level for the borrower's family size." (Defendants' Ex. M at p. 2. *See also* Federal Student Aid—Repayment Plans, at www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlindex2.html).

Enrollment in the ICRP is not a viable option for Zook. The ICRP calculation for discretionary income ignores Zook's very considerable medical bills, and thus would over-calculate Zook's disposable income (her income available after meeting necessary expenses), and thus would overstate the amount she would be able to pay.

Even if the ICRP could provide Zook with a payment plan that would require a nominal monthly payment, compelling Zook to do so here would result in nothing but pointless hardship. As previously noted, Zook's debt of approximately $76,000, at an interest rate of 7.14%, generates $5,426.40 in interest in the first year. Zook would need to pay approximately $450 per month to only pay the yearly interest of the loan. Zook's nominal payment through ICRP would have no chance of ever decreasing the loan's principal; indeed, as interest compounds each year, Zook would spend the next 25 years (after which the loan is forgiven under the ICRP) watching her debt increase, despite her payments.

These payments of futility in the face of ever-growing debt would have very serious psychological and financial consequences for Zook. Zook would have a significant stressor to face in her ongoing struggle with severe bipolar affective disorder; should the stressor result in or prolong a depressive episode, Zook will lose work hours or her employment altogether in coping with that episode. Any ICRP payments would come from Zook's attempts to save for the next depressive period, or would force her to forgo more of the therapy or counseling she requires to better manage her condition. With continuously growing debt, Zook would also be unable to secure any credit in the future, could not save for retirement, and would have no opportunity to make a fresh start. *See In re Jesperson,* 2007 WL 1113803, *8-9 (Bankr. D. Minn. Apr. 16, 2007) (recognizing that requiring a repayment scheme that could never reach the principal would condemn the debtor to a life of poor credit and a cash-only lifestyle, characterizing the situation as being "sentenced to 25 years in a debtors' prison without walls").

In light of Zook's severe bipolar affective disorder and its effects, Zook will be unable to repay her loans in the foreseeable future.

C.

GOOD FAITH EFFORT TO REPAY

The final inquiry is whether the debtor has, in good faith, attempted to repay the loan. *See* *Polleys,* 356 F.3d at 1310; *Brunner,* 831 F.2d at 396. A debtor must show he or she has made reasonable efforts to maximize income and minimize expenses in order to repay the loan. *See* *Polleys,* 356 F.3d at 1309. A debtor cannot intentionally over-budget, recklessly spend, flippantly ignore the debt, or otherwise strategically attempt to claim a windfall by shirking responsibility for his or her loans. The court may also consider whether the debtor has tried to make some payments when he or she could, or has sought to defer the loan or renegotiate the repayment plan. *Cf.* *Brunner,* 831 F.2d at 397 (rejecting satisfaction of the good faith requirement because the debtor made no effort to first defer the loan payments while she was unemployed, and filed for discharge of the debt shortly after she finished her education and prior to the first payment being due).

Here, Zook has made good faith efforts both to repay her loans and to minimize her budget. Zook inherited $180,000 and, although no payments were due at that time, paid back $30,000 of her undergraduate student loans. According to Zook's testimony, she saved and invested the remaining money ($150,000) to pay for medical school and provide for her cost of living during that period.[6] To minimize her budget, Zook stopped seeing her occupational therapist, and went from seeing Dr. Cox once a week to twice a month, in order to minimize her expenses. There is nothing in evidence which indicates that Zook is in any way attempting to avoid repayment of her loans in bad faith.

Zook has not proceeded in bad faith in failing to agree to an ICRP plan. There is no per se rule that failure to agree to an ICRP plan establishes bad faith. *See* *Educ. Credit Mgmt. Corp. v. Mosley,* 494 F.3d 1320, 1327 (11th Cir. 2007); *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett),* 487 F.3d 353, 364 (6th Cir. 2007); *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),* 409 F.3d 677, 682 (6th Cir. 2005). Moreover, the ICRP is "not always a viable option for debtors . . ., as it may require them effectively to `trad[e] one nondischargeable debt for another' because any debt that is discharged under the program is treated as taxable income." *In re Mosley,* 494 F.3d at 1327 (quoting *In re Barrett,* 487 F.3d at 364). Finally, Zook has demonstrated (as discussed with respect to future ability to pay in part IV(B), above), the ICRP would not work for her because it would understate her medical expense needs and her need to reserve for the practically inevitable periods of unemployment she will suffer due to her medical condition.

V

Having satisfied the three requirements of the *Brunner* standard, Zook has established that she would undergo an undue hardship were she compelled to repay her education loans. As such, a judgment follows declaring that her student loans at issue in this adversary proceeding be discharged pursuant to 11 U.S.C. § 523(a)(8).

[1] *See* *Educ. Credit Mgmt. Corp. v. Polleys,* 356 F.3d 1302, 1309 (10th Cir. 2004); *In re Saxman,* 325 F.3d 1168, 1173 (9th Cir. 2003); *In re Cox,* 338 F.3d 1238, 1241 (11th Cir. 2003); *In re Gerhardt,* 348 F.3d 89, 91 (5th Cir. 2003); *Goulet v. Educ. Credit Mgmt. Corp.,* 284 F.3d 773, 777 (7th Cir. 2002); *In re Brightful,* 267 F.3d 324, 327 (3d Cir. 2001). *See also* *In re Hornsby,* 144 F.3d 433, 437 (6th Cir. 1998) (recognizing the significance of the *Brunner* factors, but also considering any other factors deemed relevant in a particular case).

[2] Under that standard, a court considers: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case." *In re Long,* 322 F.3d at 554 (internal citations omitted).

[3] Defendants represented that the ECMC interest rate was 7.14% per annum, but did not expressly provide the interest rate for the TGSLC debt. (*See* DE No. 49, pp. 2-3.) For the present calculations, the 7.14% rate will be used for both loans.

[4] Similarly, Zook's level of expenditure on rent is justified by her medical condition which would make it difficult for her to minimize that expense by sharing an apartment with someone else. Defendants have not challenged that expenditure which consumes a large portion of Zook's income.

[5] Zook repeatedly testified that she was likely to be terminated at her place of employment in the near future, due to her self-assessed, poor performance. In light of Zook's medical conditions and work history, that testimony is quite credible.

[6] In addition to being used to pay for Zook's unsuccessful attempts at completing medical school and living expenses, Zook lost $20,000 investing in the stock market, and spent $20,000 to pay for later hospitalization.

Appendix B: Liability for Co-Signers and Non-Signers

From a prospective point of view – that is, if you are thinking about signing one of these loans – you must realize that the statute as passed formally does not recognize any distinction at all between the students who signed the loan and theoretically benefited from the education and other people who signed but did not receive the education. Most courts have taken that as a sign that congress intended for there to be no difference between the ways students and co-signers are treated in bankruptcy.

Let's take a short step back and discuss why we are discussing a co-signer having to pay, anyway, and some ways that might come up. First of all, what is a "co-signer"? A co-signer is someone who signs a loan to add security for the lender, and they are often called "guarantors." In any event, it's a little different than "also signing" the loan – the co-signer is a kind of "back-up" payer in case the signer can't pay. In other words, if you "sign" the loan, you are first on the hook (along with anyone else who also just signs it), but if you are a "co-signer" or "guarantor," you will only owe the money if the signer does not pay.

Some people are surprised that signing a student loan puts you in the same place whether or not you are the student. At first blush, that interpretation could seem perfectly appropriate under the law and in economics – provided that the application process does not hide or confuse the point. It is appropriate because people co-sign loans for their own reasons and are, presumably, getting something that they want out of the deal. People do it because they want to help the student; if you were giving the student cash instead, you wouldn't expect someone else to pay it, would you?

On the other hand, the bankruptcy rule on student loan discharge was enacted to keep students from borrowing and then, just before the time came to pay, declaring bankruptcy to wipe out the debt. Then the student would be left with the education – which in the lobby-influenced congress meant an asset that would provide income and opportunity for the rest of the student's life – but not have to pay for it. That "concern" was supposedly one of the main things that caused congress to create the rule. Co-signers are ***not*** like students in those ways.

They would not be left with an asset and no debt (because they are signing for someone else), but more importantly, they do not have the control to pull off that kind of scheme, being only the "fall-back" payer whose obligation to pay only comes if the student has defaulted. Likewise, the co-signer does not have the ability to defer payments on the loan (to keep it out of default) or to adopt the ICRP or other payment plans. Courts that have been confronted with this logic have for the most part fallen back on the second supposed reason for the harshness of the rule: the "importance" of maintaining a fund for *other* student loans. See our discussion of the Pelkowski case, below, for more on this.

In any event, the state of the law is that discharge in bankruptcy is just as hard for co-signers as it is for signers in *most* jurisdictions. If you are on the hook and facing disaster, you should certainly check to see whether your jurisdiction is one of the few that gives co-signers a break. If you are considering co-signing, just make sure you know that's what you are doing, because whether you do or not, you're probably going to pay if it comes to that.

What Triggers Co-signer Liability?

The essence of co-signer liability is that it comes into existence when the “signer” does not pay as obligated. What does the lender have to prove in order to come after the co-signer? That is probably determined by the student loan contract, and you need to know exactly what it is before you sign and certainly before you pay anything. Is it a certain number of missed payments? Is it a lawsuit or discharge in bankruptcy? Ordinarily, it will be some type of “default” – a specified number of missed payments or unpaid balance, but again – this will probably be determined by the loan document. If it is anything short of a discharge in bankruptcy, a collection action against a co-signer will give the co-signer a right to sue the signer for the money, although as a practical reality this is not likely to be worth much, if anything.

As you can probably see, it is possible for the co-signer to end up liable for the debt even though the original signer no longer is liable – if the signer gets the loan discharged. This means that if a student declares bankruptcy and seeks to have the loan discharged, the co-signer is in an *adversary* position (that means, on the other side) to the student. In a rare case, this could matter between students and co-signers, as the student’s discharge is going to cause the debt collectors to focus all their energies on the co-signer. In any event, you need to know that a signer’s bankruptcy discharge *shifts the burden to the co-signers*. It does not, as some may think, eliminate the debt.

What if the student declares bankruptcy after not paying loans for a while and cannot get the student loan discharged. *Then* the lender goes after the co-signer, the student’s ex-husband. Does the ex-husband still have a right against the student? Or was that erased by the bankruptcy? That would probably be decided by the state law of the state in which the people resided. The question would be whether the contingent repayment obligation was certain enough to be extinguished by the bankruptcy or not. We haven’t seen any cases on this issue yet.

Students vs. Parents

As we note above, student loans that have gone unpaid put the signer and the co-signer in at least adversary positions. We do not distrust anybody – we simply note the reality. Not all co-signers are parents, either, and relationships that fall apart leaving exes with failed loans are not uncommon. Some risks that have a low probability of occurring have such severe consequences that they should not be undertaken. Co-signing a student loan might be one of those things.

We discuss two cases in this section: *In re Pelkowski, Corso v. Walker,* and *In re Hixson.*

Pelkowski addressed the question of whether co-signers would be held to the standard of “undue hardship” as discussed in the text. We believe that *Pelkowski* or another case holding the same thing is destined to be adopted by every circuit, and as you will see, it applies the same standards to signers and co-signers.

Corso v. Walker addresses a divorce settlement and agreement where the wife agreed to pay student loan debt. The court allowed this to be discharged because the agreement with her ex-husband, who had given her money in the divorce to offset the loans, was not an “educational loan.” Rather, it was property division, and the ex-husband could not assert the higher standard applying to educational loans. The court also turned a blind eye to other aspects of the case – this did not appear to be a particularly just result to us.

Pelkowski Discussion

In *Pelkowski,* the plaintiff was a mother who had co-signed several student loans on behalf of two different children. She was also the only person who signed one note for one of her children. Neither of her children were making payments Her liabilities on those notes at the time she sought bankruptcy discharge was slightly over $11,000 on the notes she had co-signed (plus 9% interest) and slightly under $1,500 (plus 12%) on the note on which she was the sole signer (for one of her children's education). It would appear from the decision that Pelkowski could not show "undue hardship" presented by the debts, and she agreed that she couldn't.

The bankruptcy court held that Pelkowski was not entitled to discharge on the loan for which she was sole signer, and that she did not *need* to show undue hardship on the loans for which she co-signed. The bankruptcy court discharged them.

The district court reversed the discharge, finding that Pelkowski was required to show undue hardship before receiving discharge on the debts she co-signed. She appealed that decision reversing the discharge of the co-signed loans but abandoned her efforts regarding the loan for which she had signed by herself.

The appeals court in *Pelkowski* held that signers and co-signers would be held to the same standard when it came to attempting to discharge a student loan debt in bankruptcy. As an issue of statutory construction, this makes some sense because the bankruptcy statute itself does not distinguish between students and co-signers. From a traditional and economic standpoint it also makes sense, as you are attempting to accomplish something for yourself when you co-sign the loan (i.e., you want to help get a child or friend a loan, and you agree to pay).

On the other hand, as we have pointed out, the borrowers have powers the co-signers do not have, including whether or not to seek deferment or to adopt a more flexible payment plan like the ICRP. Also, the concern that theoretically brought about the rule regarding student loans and bankruptcy in the first place was that students would use the loans to get their education and then, before the debt came due and before they had any tangible assets to give up in bankruptcy, would declare bankruptcy as a way of walking away from their debt.

Co-signers obviously do not enrich themselves through education and then try to shrug off the debt. They have no control over when their guarantee becomes a debt (this only happens when the student fails to pay), and they do not have the education as an asset. Their debt is much more similar to "garden variety" debts than student loans. Also, from some sort of basic human concept of fairness, many co-signers don't seem to understand that they are really, definitely, and completely on the hook as much as the students. They don't get how terrible it can be. Some bankruptcy judges have sympathized.

We will repeat here the way the courts work. If you're in bankruptcy, you start with an actual bankruptcy judge, who oversees and rules on the "core" proceedings regarding most claims by creditors. The bankruptcy judge will also preside over the "adversary" proceedings which are separate "mini-cases" within the bankruptcy court. In order to get a student loan discharged, you must file an adversary action asking for that against the lender, and a district court (federal) judge would hear an appeal of a bankruptcy judge on the adversary action. Then the case can be appealed to the court of appeals. So there are two essentially "automatic" levels of appeal, and beyond that it would be possible to request the Supreme Court to hear an appeal – which it might, or might not, do.

This many levels of appeal are destined to crush almost any showing of compassion by a judge based upon personal considerations. We believe that *In re Pelkowski, 990 F. 2d 737 (3rd Cir. 1993)* is a statement of the law that every court will follow regarding non-students' ability to discharge student loans *if put to the question*. The text of the case is below.

Although another court of appeals could conceivably disagree with the *Pelkowski* decision, and such an agreement would at least have the argument that Congress did not actually intend the rules to apply so harshly to co-signers, our opinion is that *Pelkowski* got it right. People co-signing student loans are using the same money, for the same essential purpose, as students are. Students, aware that their co-signers could really be stuck with the loans they themselves manage to ditch, will probably be more reluctant to avoid the loans themselves.

The lesson of Pelkowski is that co-signers must treat these loans just as seriously as the students should be doing. As we said above, this will eventually have the effect of forcing parents to take a more active role in judging the value of the education their children are pursuing. This won't be comfortable for anybody, but it is long overdue in our opinion, and it should, in turn, exert powerful downward pressure on tuition prices.

Your lawyer will presumably know whether you are in one of these remaining jurisdictions where the bankruptcy courts have held that co-signers can be treated differently. Here are all the decisions of which we know where the bankruptcy court held co-signers could get their loans discharged: *In re Kirkish,* 144 B.R. 367 (Bankr.W.D.Mich. 1992); *In re Behr,* 80 B.R. 124 (Bankr.N.D.Iowa 1987); *In re Meier,* 85 B.R. 805 (Bankr.W.D.Wis. 1986); *In re Zobel,* 80 B.R. 950 (Bankr.N.D.Iowa 1986); *In re Bawden,* 55 B.R. 459 (Bankr. M.D.Ala.1985); *In re Washington,* 41 B.R. 211 (Bankr.E.D.Va.1984); *In re Boylen,* 29 B.R. 924 (Bankr.N.D.Ohio 1983) (all holding such debt dischargeable).

Our take on the issue is that even in such courts you should seek discharge on the assumption that you should be treated differently – and then you should make sure you settle or get the creditors to agree to your plan without having an appealable decision. We believe the lenders will always win on appeal, but as we will discuss below, this does not mean that they have a strong motive to appeal. In the final analysis, they want money, and if you don't have any, and it doesn't look like you will get any any time soon, they may take what they can get.

If you are a co-signer, you need to find out whether or not your bankruptcy court fits into this small group of hold-outs, or whether the courts in your jurisdiction have not ruled on the issue (much more likely). As of this writing, we are aware of a few courts of appeals that agree with *Pelkowski* and refuse to make the distinction, and several lower courts: *In re Dull,* 144 B.R. 370 (Bankr. N.D.Ohio 1992); *In re Hawkins,* 139 B.R. 651 (Bankr.N.D.Ohio 1991); *In re Martin,* 119 B.R. 259 (Bankr.E.D.Okla.1990); *In re Hudak,* 113 B.R. 923 (Bankr.W.D.Pa.1990); *In re Taylor,* 95 B.R. 550 (Bankr.E.D.Tenn.1989); *In re Hammarstrom,* 95 B.R. 160 (Bankr.N.D.Cal.1989); *In re Barth,* 86 B.R. 146 (Bankr.W.D.Wis.1988); *In re Feenstra,* 51 B.R. 107 (Bankr.W.D.N.Y.1985).

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In re Pelkowski

990 F.2d 737 (1993)

In re Virginia M. PELKOWSKI a/k/a Virginia M. Dodd, Debtor, Appellant,
Ohio Student Loan Commission, The Loan Servicing Center, James K. McNamara, Esq., Trustee.

No. 92-3309.

United States Court of Appeals, Third Circuit.

Argued December 15, 1992.

Decided March 24, 1993.

738*738 Gary H. Nash (argued), Yochim, Skiba, Moore & Nash, Erie, PA, for appellant.

Lee Fisher, Ohio Atty. Gen., Jay M. Patterson (argued), Asst. Atty. Gen., Columbus, OH, for appellee, Ohio Student Loan Comn.

Sydelle Pittas (argued), Powers & Hall, P.C., Boston, MA, for amicus-appellees The Education Resources Institute; Massachusetts Higher Educ. Assistance Corp.; Massachusetts Educ. Financing Auth.; and Pennsylvania Higher Educ. Assistance Agency.

Before SLOVITER, Chief Judge, GREENBERG, Circuit Judge, and POLLAK, District Judge.[*]

OPINION OF THE COURT

SLOVITER, Chief Judge.

The issue before us, whether a non-student co-obligor of a guaranteed educational loan may be discharged from that debt in bankruptcy without proving one of the statutory exceptions, is one of first impression in the courts of appeals. Over the last ten years, the bankruptcy courts have divided on this issue,[1] although the three district courts to have considered it have decided against discharge.[2]

I.

Facts and Procedural History

The relevant facts were stipulated in the bankruptcy court. Appellant Virginia M. Pelkowski, a/k/a Virginia M. Dodd, filed a voluntary petition for Chapter 7 bankruptcy and listed among her debts seven loans guaranteed by the Ohio Student Loan Commission for the educational expenses of her children, Christine and Michael. Pelkowski filed a complaint against the Loan Commission to determine dischargeability of the seven loan debts under Bankr.Rule 4007 and 11 U.S.C. § 523(a)(8) (1988).

Pelkowski signed six of the notes as co-maker, four with Christine and two with Michael.[3] As of April 23, 1991, Pelkowski's 739*739 liability was $7,163.74 plus 9% interest on the loans for Christine's educational expenses and $3,817.12 plus 9% interest on the loans for Michael's educational expenses.

The bankruptcy court ordered the debts discharged. 135 B.R. 254 (Bankr.W.D.Pa. 1992). The court held that 11 U.S.C. § 523(a)(8), the statutory provision limiting dischargeability of debts for certain educational loans, was inapplicable to non-student co-makers of notes for such loans. Thus, Pelkowski was not required to prove either of the exceptions to nondischargeability, i.e., that the loan came due more than five (now seven) years before she filed the bankruptcy petition, 11 U.S.C. § 523(a)(8)(A), or that nondischarge of the debt would create "undue hardship" for her and her dependents, *id.* § 523(a)(8)(B). The bankruptcy court acknowledged that there was a split of authority, but chose to follow cases such as *In re Boylen,* 29 B.R. 924, 926-27 (Bankr.N.D.Ohio 1983), which held that section 523(a)(8) was intended to apply only to student obligors. The Loan Commission appealed.

The district court reversed. It distinguished *Boylen,* treating as dictum the *Boylen* court's discussion of the applicability of section 523(a)(8) to non-student co-makers of loan notes. Instead, the district court agreed with the majority of recent bankruptcy court decisions which held that section 523(a)(8) applies equally to non-student co-makers and student makers. *See* cases cited note 1 *supra.* In view of the parties' stipulation in the bankruptcy court that Pelkowski could not meet either of the statutory exceptions to discharge, the district court held that the six loan debts were nondischargeable.

There was a seventh note which Pelkowski signed as sole maker for the educational expenses of Christine. The bankruptcy court, relying on *In re Hudak,* 113 B.R. 923 (Bankr.W.D.Pa.1990), held that Pelkowski's debt as sole maker was nondischargeable and ordered the debt of $1,388.89 plus 12% interest not discharged. Pelkowski apparently conceded this issue and did not appeal the order of nondischargeability of that debt to the district court, nor does she challenge that holding here.

Pelkowski appeals the order holding nondischargeable the six loans on which she served as co-obligor. We have jurisdiction under 28 U.S.C. § 158(d) (1988). As this case turns on the interpretation of a provision of the Bankruptcy Code, our review is plenary. *In re Roth Am., Inc.,* 975 F.2d 949, 952 (3d Cir.1992).[4]

II.

Discussion

A.

The Guaranteed Student Loan Program (hereafter Program), which was established as part of the comprehensive Higher Education Act of 1965, was designed to ensure that colleges and students attending colleges would have reasonable access to low interest rate loans. S.Rep. No. 673, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 4027, 4030. Under the Program, educational loans from banks, credit unions, educational institutions, and other lenders are insured by the United States Department of Education or by state agencies or nonprofit organizations and reinsured by the Department of Education. 20 U.S.C. §§ 1078, 1084, 1085(d) (1988); *see* H.R.Rep. No. 595, 95th Cong., 2d Sess. 135, 140 (1977), *reprinted in* 1978 U.S.C.C.A.N. 740*740 5787, 5963, 6096, 6101. If the borrower fails to make repayments because of death or disability, or is relieved of the obligation to pay through discharge in bankruptcy, the lender is entitled to repayment from the federal government. 20 U.S.C. § 1087; *see* H.R.Rep. No. 595, at 135, 140, *reprinted in* 1978 U.S.C.C.A.N. at 6096, 6101.

Initially, loans made under the Program were fully dischargeable in bankruptcy. A major change in this regard was effected by the Bankruptcy Reform Act of 1978 which severely restricted dischargeability of student loans.[5] That provision, section 523(a)(8), in the form applicable to Pelkowski, reads:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt —

. . . . .

(8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education, unless —

(A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

. . . .

11 U.S.C. § 523(a)(8) (1988).[6]

The parties stipulated in the bankruptcy court that the Ohio Student Loan Commission is a "governmental unit" and thus the loan program is within the statute. The parties also stipulated that payment on Pelkowski's seven loans did not come due more than five (or seven) years before she filed for bankruptcy, and that excepting the debts from discharge would not create "undue hardship" for her and her dependents. Thus the appeal turns only on whether Pelkowski's debt as co-maker on the notes signed for loans for her children's education falls within section 523(a)(8).

B.

Pelkowski first suggests that because she is not a student, the statute does not apply to her. Apparently Pelkowski seeks to distinguish between signatories to the loan who receive the educational benefits and those who do not, and to argue that only the former are covered by the provision making such debts nondischargeable. Some courts have made a similar distinction, holding that an "educational loan" includes only the debt incurred by the student for his or her own education. *See, e.g.,In re Washington,* 41 B.R. 211, 214 (Bankr.E.D.Va.1984) (student loan "is only an `educational loan' as to that party that received the benefits of the loan"). *But see In re Martin,* 119 B.R. 259, 261 741*741 (Bankr.E.D.Okla.1990) (debt is educational loan because "the obligation incurred by the [debtors] was for educational purposes, albeit for their son").

We find no support in the statutory language for any distinction based on the status of the borrower as student or as beneficiary of the education. Section 523(a)(8) does not refer to a "student debtor" but applies to limit discharge of any "individual debtor" from "any debt" for a covered educational loan. In the absence of clearly expressed contrary legislative intent, the statutory language must be regarded as conclusive. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980); *United States v. Bey,* 736 F.2d 891, 893 (3d Cir.1984).

Like the other subsections of 11 U.S.C. § 523(a), section 523(a)(8) describes a particular kind of debt that is excepted from discharge. *See* 11 U.S.C. § 523(a)(1)-(8) (1988); *id.* § 523(a)(9)-(12) (Supp.III 1992). Examples are tax debts, excepted by subsection (1), and spousal and child support obligations, excepted by subsection (5). 11 U.S.C. § 523(a)(1), (a)(5); *cf. In re Roberts,* 149 B.R. 547 (C.D.Ill.1993) ("The focus of

§ 523(a)(8) is on the nature and character of the loan, not how the recipient actually spent the money."). We note that any suggestion that there is a statutory distinction based on the status of the obligor of the note is inconsistent with Pelkowski's own concession that the seventh note, for which she was the sole maker, cannot be discharged.

In any event, the language and structure of the statute reveal no intent to restrict its reach to student debtors for expenses for their own education. To the contrary, such exceptions to nondischargeability as exist are "carefully delineated in subsections (A) and (B)." *In re Barth,* 86 B.R. 146, 148 (Bankr.W.D.Wis.1988). Our rejection of any limitation of section 523(a)(8) based on the beneficiary of the loan or the recipient of the education is consistent with the weight of authority. *See In re Wilcon,* 143 B.R. 4, 5 (D.Mass.1992) ("[t]he plain language of 11 U.S.C. § 523(a)(8) mandates that *any* debt incurred by *an individual debtor* for an educational loan ... is nondischargeable");*In re Varma,* 149 B.R. 817, 818 (N.D.Tex.1992) ("The relevant inquiry into the applicability of [section 523(a)(8)] is the purpose of the loan, not the beneficiary of the education."); *In re Selmonosky,* No. 1:89-CV-251-HTW, slip op. at 6 (N.D.Ga. filed May 18, 1989) (unreported decision) ("[section] 523(a)(8) applies to non-student debtors in addition to student debtors"); *In re Dull,* 144 B.R. 370, 372 (Bankr.N.D.Ohio 1992) ("the fact [that] a debtor received no educational benefit from the loans does not exclude him from [section 523(a)(8)'s] provisions"); *In re Hawkins,* 139 B.R. 651, 652-53 (Bankr. N.D.Ohio 1991); *Martin,* 119 B.R. at 261;*Hudak,* 113 B.R. at 924; *In re Taylor,* 95 B.R. 550, 552 (Bankr.E.D.Tenn.1989); *In re Hammarstrom,* 95 B.R. 160, 162 (Bankr. N.D.Cal.1989) ("The language of section 523(a)(8) does not limit its application to educational loans in which the student is the borrower."); *Barth,* 86 B.R. at 148; *In re Feenstra,* 51 B.R. 107, 110-11 (Bankr. W.D.N.Y.1985).

C.

Pelkowski's principal argument is that because she was only a co-maker of the six notes at issue here,[7] section 523(a)(8) does not apply. She reasons that because co-makers are not mentioned in section 523(a)(8), Congress intended to include only primary makers of notes within the statute's ambit. Pelkowski seeks to find a statutory ambiguity from the statute's silence. We see no reason to create 742*742 an ambiguity. If Congress had intended that section 523(a)(8) not apply to non-student co-makers of educational loan debt, we assume that it would have so stated. *See, e.g., Consumer Prod. Safety Comm'n,* 447 U.S. at 109, 100 S.Ct. at 2056.

At oral argument, Pelkowski suggested that the statutory reference to an "individual" debtor supported her contention that the provision was designed to cover only an individual maker of the note. We believe it is evident that "individual" debtor is used in contradistinction to "corporate" debtor. *See Garrie v. James L. Gray, Inc.,* 912 F.2d 808, 812 (5th Cir.1990) (willful and malicious injury exception to discharge, like the other exceptions in 11 U.S.C. § 523, applies only to individual, not corporate, debtors), *cert. denied,* ___ U.S. ___, 111 S.Ct. 1108, 113 L.Ed.2d 218 (1991). Although resort to the legislative history is therefore unnecessary to decide this case, our inquiry in that regard discloses no support for Pelkowski's position.

It is undisputed that section 523(a)(8) was enacted in response to the belief that students were taking advantage of the loan program. In the early 1970's, there was concern by legislators and the public about the perceived rise in bankruptcy filings by students on the brink of lucrative careers. *See* H.R.Doc. No. 137, 93d Cong., 1st Sess., Pts. I and II (1973), *reprinted in* App. 2 *Collier on Bankruptcy* § I, at 176-77 (Lawrence P. King, et al., eds., 15th ed. 1992) [hereinafter *Collier's*].

Soon thereafter, as part of the contemplated Education Amendments of 1976, the House Education and Labor Committee proposed to except educational loan debt from discharge in bankruptcy unless the debtor could show undue hardship or that the loan came due more than five years before the bankruptcy filing. H.R.Rep. No. 595, at 132, *reprinted in* 1978 U.S.C.C.A.N. at 6093. Although the nondischargeability provision was enacted as an amendment to the Higher Education Act of 1965, *see* note 5 *supra,* it was reconsidered by Congress shortly thereafter. There was opposition by the House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights to treating educational loan debt and student debtors differently than other debt and other debtors. *See* H.R.Rep. No. 595, at 132, *reprinted in* 1978 U.S.C.C.A.N. at 6093. For a more detailed history of the legislation, see generally Jerome M. Organ, Note, *"Good Faith" and the Discharge of Educational Loans in Chapter 13: Forging a Judicial Consensus,* 38 Vand.L.Rev. 1087, 1093-100 (1985).

Nonetheless, during consideration of H.R. 8200 by the full House, which eventually culminated in the Bankruptcy Reform Act of 1978, Representative Ertel of Pennsylvania sponsored an amendment adding an educational loan nondischargeability provision, which quickly passed the House. *See* 124 Cong.Rec. 1791, 1798 (1978). This amendment was included in the Senate Bill, S. 2266, in substantially the same form. *See* 124 Cong.Rec. 33,992, 33,998.

There was little discussion of the nondischargeability provision either in the House or Senate. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 79 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5865; 124 Cong.Rec. 28,284, 32,350-420, 34,143-45. On the Senate floor, Senator DeConcini reviewed the provisions of the bankruptcy bill, including this section, but did not discuss its purpose. 124 Cong.Rec. 33,992, 33,998. Thus, the principal indication of legislative intent can be discerned from statements made by the House supporters of the provision.

Representative Ertel stated that the purpose of the provision was

to keep our student loan programs intact.... [T]he default rate in the student loan program has been escalating to tremendous proportions in the past year.... [T]he number of students going into bankruptcy — or ex-students — has increased....

. . . .

... Without this amendment, we are discriminating against future students, because there will be no funds available for them to get an education.

124 Cong.Rec. 1791-92.

There were similar statements by other House members. Representative 743*743 Mottl stated, "[t]here has been in the last few years a dramatic upswing in the number of student loan bankruptcies." *Id.* at 1792. Representative Erlenborn criticized debtors who,

not having assets to pledge, [are] pledg[ing their] future earning power. Having pledged that future earning power, if, shortly after graduation and before having an opportunity to get assets to repay the debt, [they] seek[] to discharge that obligation, I say that is tantamount to fraud.

Id. at 1793. Although he also remarked that "nothing in the provision ... prohibits the discharge of the non-student loan debt," *id.* at 1795, it is clear from the context that he was referring to other debts of student debtors. In any event, even if his comment could be read as referring to non-student debtors, the Supreme Court has advised that the remarks of a single legislator are not controlling in analyzing legislative history. *Consumer Prod. Safety Comm'n,* 447 U.S. at 118, 100 S.Ct. at 2061. It is considerably more significant that the debate in the main focused on the twin goals of rescuing the student loan program from fiscal doom and preventing abuse of the bankruptcy process by undeserving debtors. *See generally* 124 Cong.Rec. 1791-98; H.R.Rep. No. 595, at 132-62, *reprinted in* 1978 U.S.C.C.A.N. at 6093-123.

We therefore agree with the Sixth Circuit, which concluded that "Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of the educational loan programs." *In re Merchant,* 958 F.2d 738, 742 (6th Cir.1992)(holding that educational bank loans guaranteed by private educational institutions and extensions of credit by such institutions are not dischargeable).

Pelkowski argues that because this legislative history shows that Congress was seeking to prevent recent graduates from discharging their loan commitments in bankruptcy before becoming wage-earning members of the community, the provision is inapplicable to co-signers like herself who are not students and who therefore cannot abuse the loan program in this manner. Similar reasoning was adopted by those bankruptcy courts which held that non-student co-makers of educational loans are not covered by section 523(a)(8). *See In re Kirkish,* 144 B.R. 367, 369 (Bankr. W.D.Mich.1992); *In re Behr,* 80 B.R. 124, 126-27 (Bankr.N.D.Iowa 1987); *In re Meier,*85 B.R. 805, 806-07 (Bankr.W.D.Wis. 1986); *In re Zobel,* 80 B.R. 950, 951-52 (Bankr.N.D.Iowa 1986); *In re Bawden,* 55 B.R. 459, 461 (Bankr.M.D.Ala.1985); *Washington,* 41 B.R. at 214; *Boylen,* 29 B.R. at 926-27.

The Loan Commission and the *amici* read the legislative history differently. They point out that the statute was amended on several occasions, always to expand its coverage, demonstrating congressional intent to make the discharge of educational loan debt more difficult for all debtors. Thus, for example, recently Congress lengthened the time interval before an educational loan can become dischargeable from five to seven years. *See* note 6 *supra.* Although Pelkowski contends, and the bankruptcy court in this case agreed, that the time limitation for discharge is inapposite to a middle-aged parent co-maker with other debts, we find this argument unpersuasive. Patently, an unrepaid loan will adversely affect the financial integrity of the educational loan program equally whether the defaulting debtor is the student or the student's co-obligor.

Pelkowski argues that Congress could not have intended section 523(a)(8) to restrict dischargeability of educational loan debts by a debtor co-signer because there were relatively few such co-signers in 1978 when the statute was enacted. The most this argument proves, even if the factual predicate is true, is that Congress gave little or no thought to the effect of the nondischargeability provision on non-student co-signers.

The absence of clear congressional intent to include co-signers does not resolve the question in Pelkowski's favor. The Supreme Court has cautioned against reading "much into nothing. Congress cannot be expected to specifically address each issue744*744 of statutory construction which may arise." *Albernaz v. United States,* 450 U.S. 333, 341, 101 S.Ct. 1137, 1143, 67 L.Ed.2d 275 (1981); *see United States v. Standefer,* 610 F.2d 1076, 1084 (3d Cir.1979) (in banc), *aff'd,* 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). In section 523(a)(8), Congress has enacted a provision to except from discharge "any debt ... for an educational loan." The legislative history reveals a clear congressional intent to prevent debtor abuse of the Program and depletion of the Program's resources. This is a case in which the insistence on ... an affirmative expression of intent in the course of legislative hearings or in the body of a legislative report would more likely have the effect of undermining congressional authority rather than respecting Congress' desires.

Standefer, 610 F.2d at 1083. In our view, the "overall policy" of the statute "can only be served by rendering all such loans as nondischargeable." *Martin,* 119 B.R. at 261.

Neither Pelkowski nor any of the bankruptcy courts adopting the position she advocates have explained why section 523(a)(8) applies to prevent discharge of a non-student's debt when the non-student is the sole obligor, which has been the uniform holding of every court to have considered the issue, *see* *Hawkins,* 139 B.R. at 653 (section 523(a)(8) applies where non-student is sole maker); *Hudak,* 113 B.R. at 924 (same); *Hammarstrom,* 95 B.R. at 162 (same); *Feenstra,* 51 B.R. at 110-11(same); *see also* *Varma,* 149 B.R. at 818 (two non-student makers); *Selmonosky,* No. 1:89-CV-251-HTW, slip op. at 5-6 (same); *Martin,* 119 B.R. at 261 (same), yet does not apply if the student has also signed the note. Because no court has discussed a situation like Pelkowski's, in which the non-student debtor is obligor on one note and co-obligor on others, the evident inconsistency in that position has never previously been addressed.

The congressional intent to eliminate debtor abuse of the educational loan program would apply both to single makers of loan notes and to co-makers, whether students or their parents or other co-signers, as all may abuse the bankruptcy system or take advantage of legal loopholes. *Hawkins,* 139 B.R. at 653; *Feenstra,* 51 B.R. at 110. Moreover, as some bankruptcy courts have recognized, limiting the circumstances under which student loan obligations can be discharged in bankruptcy helps preserve the financial integrity of the student loan program, *see, e.g.,* *Dull,* 144 B.R. at 372; *Hawkins,* 139 B.R. at 653; *Hudak,* 113 B.R. at 924; *Hammarstrom,* 95 B.R. at 164, the other clearly expressed legislative concern. Even though the debt of the student co-signer would remain outstanding notwithstanding the co-signer's discharge, *see* *Bawden,* 55 B.R. at 462 (although mother's debt as endorser dischargeable, "[w]ere the daughter to file [for] bankruptcy, the debt would be nondischargeable as to her"), releasing co-signers could likely, if not necessarily, affect the economic viability of the student loan program. After all, the lenders seek the security of a nonstudent co-signer precisely because there is a commercial risk in looking only to the student for credit assurance.

In the end, Pelkowski's position, which finds support in neither the statutory language nor the legislative history, rests upon the argument that the Loan Commission's interpretation of the statute runs counter to the purposes of the Bankruptcy Code to release an honest debtor from financial burdens and to facilitate the debtor's unencumbered "fresh start." *Kokoszka v. Belford,* 417 U.S. 642, 645-46, 94 S.Ct. 2431, 2433-34, 41 L.Ed.2d 374 (1974). She refers to section 727 of the Code, which provides that a court "shall grant" the debtor a discharge unless certain enumerated grounds are shown, such as fraud or other deceit on the debtor's part. *See* 11 U.S.C. § 727 (1988).

Admittedly, it is well accepted that exceptions to discharge, which reflect a congressional determination that other public policies outweigh the debtor's need for a fresh start, should be narrowly construed against the creditor and in favor of the debtor. *In re Decker,* 595 F.2d 185, 187 (3d Cir.1979); *see also 3 Collier's* ¶ 523.05A, at 19 ("Any other construction would be inconsistent with the liberal spirit that 745*745has always pervaded the entire bankruptcy system."). However, in the case of section 523(a)(8), Congress has revealed an intent to limit the dischargeability of educational loan debt, and we can construe the provision no more narrowly than the language and legislative history allow. *Cf.* *Johnson*

v. Edinboro State College, 728 F.2d 163, 164 (3d Cir.1984) (fresh start is only one of several policies underlying the Bankruptcy Code); *Barth,* 86 B.R. at 149 ("While it is true that section 523(a)(8) runs counter to the general `fresh start' philosophy of the Bankruptcy Code, the same could be said of any exception to discharge.").

We are persuaded that section 523(a)(8) applies to a co-signer of a note for the educational expenses of another person, and that the district court correctly found Pelkowski's debts nondischargeable.

III.

Conclusion

For the foregoing reasons, we will affirm the order of the district court.

[*] The Honorable Louis H. Pollak, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

[1] *Compare In re Dull,* 144 B.R. 370 (Bankr. N.D.Ohio 1992); *In re Hawkins,* 139 B.R. 651 (Bankr.N.D.Ohio 1991); *In re Martin,* 119 B.R. 259 (Bankr.E.D.Okla.1990); *In re Hudak,* 113 B.R. 923 (Bankr.W.D.Pa.1990); *In re Taylor,* 95 B.R. 550 (Bankr.E.D.Tenn.1989); *In re Hammarstrom,* 95 B.R. 160 (Bankr.N.D.Cal.1989); *In re Barth,* 86 B.R. 146 (Bankr.W.D.Wis.1988); *In re Feenstra,* 51 B.R. 107 (Bankr.W.D.N.Y.1985) (all holding such debt nondischargeable) *with In re Kirkish,* 144 B.R. 367 (Bankr.W.D.Mich. 1992); *In re Behr,* 80 B.R. 124 (Bankr.N.D.Iowa 1987); *In re Meier,* 85 B.R. 805 (Bankr.W.D.Wis. 1986); *In re Zobel,* 80 B.R. 950 (Bankr.N.D.Iowa 1986); *In re Bawden,* 55 B.R. 459 (Bankr. M.D.Ala.1985); *In re Washington,* 41 B.R. 211 (Bankr.E.D.Va.1984); *In re Boylen,* 29 B.R. 924 (Bankr.N.D.Ohio 1983) (all holding such debt dischargeable).

[2] *See In re Wilcon,* 143 B.R. 4 (D.Mass. 1992); *In re Varma,* 149 B.R. 817 (N.D.Tex.1992); *In re Selmonosky,* No. 1:89-CV-251-HTW (N.D.Ga. filed May 18, 1989) (unreported decision).

[3] Harold P. Dodd, to whom Pelkowski was then married, also signed as co-maker on two loans for Christine's expenses and one for Michael's. Pelkowski and Dodd were divorced on April 1, 1985, and Dodd is not a party to this case. Because neither the bankruptcy court nor the district court distinguished between notes on which Pelkowski was the sole co-maker with the student and notes on which both Pelkowski and Dodd were joint co-makers with the student, we assume the distinction was viewed as irrelevant. Neither party argues otherwise and thus we do not address the issue.

[4] A brief of *amici curiae* urging affirmance of the order of the district court has been filed by The Education Resources Institute, Inc., Massachusetts Educational Financing Authority, Massachusetts Higher Education Corporation, and Pennsylvania Higher Education Assistance Agency, all of which are nonprofit or governmental organizations that assist in education financing or in the administration of federal loan guarantee programs.

[5] A nondischargeability provision was initially enacted as part of the Education Amendments of 1976 which added a new section 439A to the Higher Education Act of 1965. *See* Education Amendments of 1976, Pub.L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (codified at 20 U.S.C. § 1087-3 (1976)) (repealed 1978). That provision was repealed effective November 6, 1978, but was replaced by a similar provision in the Bankruptcy Reform Act of 1978, 11 U.S.C. § 523(a)(8), which became effective on October 1, 1979. *See* Pub.L. No. 95-598, §§ 317, 402(a) & (d), 92 Stat. 2549, 2678, 2682 (1978);*see also* text at page 742 *infra.* Most courts confronting claims of dischargeability of educational loan debts during the eleven-month gap that Congress had inadvertently created held the debts nondischargeable. *See, e.g., In re Williamson,* 665 F.2d 683, 685 (5th Cir.1982); *In re Adamo,* 619 F.2d 216, 219 (2d Cir.), *cert. denied,* 449 U.S. 843, 101 S.Ct. 125, 66 L.Ed.2d 52 (1980). The current section 523(a)(8) is broader in application than its predecessor in the Higher Education Act, including more types of educational loans within its reach. *Compare* 20 U.S.C. § 1087-3 (1976) (repealed 1978) (applying only to loans insured or guaranteed by a governmental unit) *with* 11 U.S.C. § 523(a)(8) (1988) (applying to loans made, insured, or guaranteed by a governmental unit).

[6] Congress amended 11 U.S.C. § 523(a)(8) on November 29, 1990, with an effective date 180 days thereafter. Crime Control Act of 1990, Pub.L. No. 101-647, §§ 3621, 3631, 104 Stat. 4789, 4964-65, 4966. Among the

amendments was the increase of the time interval in section 523(a)(8)(A) from five to seven years. Because the instant case was filed on January 14, 1991, that amendment is not applicable here.

[7] Pelkowski's appellate brief denominates her an "endorser[]" on the notes, apparently in an effort to show that she is only secondarily liable as a surety. *See* *Federal Deposit Ins. Corp. v. Blue Rock Shopping Ctr., Inc.,* 766 F.2d 744, 749 (3d Cir.1985). Copies of the notes are not in the record and thus we do not know, nor is it relevant to the issue before us, whether Pelkowski is primarily or secondarily liable. *See* *Lee Fed. Credit Union v. Gussie,* 542 F.2d 887 (4th Cir.1976). We use the terms co-maker, co-signer, and co-obligor interchangeably, recognizing that there may be a distinction between these terms for other purposes.

449 B.R. 838 (2011)

Michael J. CORSO, Appellant,
v.
Maryann WALKER, Appellee.

Civil Action No. 11-8. Bankruptcy No. 09-23605-JAD. Adversary No. 09-2516JAD.

United States District Court, W.D. Pennsylvania.

May 20, 2011.

840*840 Alexander J. Jamiolkowski, Egan & Jamiolkowski, Pittsburgh, PA, for Appellant.

Mary Bower Sheats, Pittsburgh, PA, for Appellee.

MEMORANDUM OPINION

NORA BARRY FISCHER, District Judge.

I. INTRODUCTION

Pending before the Court is an **appeal of an October 22, 2010 Memorandum Opinion and Order of the Bankruptcy Court in Adversary Proceeding No. 09-23605**. (Docket No. 1). Appellant Michael J. Corso ("Appellant" or "Corso") **appeals the Bankruptcy Court's Order denying his claims that certain of Appellee Maryann Walker's** ("Appellee" or "Walker") **obligations are excepted from discharge** under 11 U.S.C. § 523(a). Based on the following, the Court finds that the Bankruptcy Court correctly held that the exceptions did not apply; therefore, the decision of the Bankruptcy Court is **AFFIRMED**.

II. BACKGROUND

As the Bankruptcy Court has fully set forth the factual background in its findings of fact and conclusions of law supporting its decision, the Court restates only the facts pertinent to the instant appeal. (*See* Docket No. 1-11). Corso and Walker were formerly married; they have since divorced. (Docket No. 1-39 at 51, 57-58). For part of their marriage, Corso worked 841*841 out of the country, in Brazil, while Walker and their three children remained in the Pittsburgh area. (*Id.* at 51-54). Walker was tasked with managing the household in her then-husband's absence, including the household finances. (*Id.* at 54).

While they were still married, Walker signed her former husband's name on applications for two federal student loans and promissory notes guaranteeing payment of same for their daughter's college expenses (hereinafter the "outstanding student loans"). (*Id.* at 61-63, 97-98). The parties presented conflicting evidence at trial regarding whether Walker was authorized to sign Corso's name on the outstanding student loans and other important household documents. (*Id.* at 54-56, 61-64, 68-69, 72-73, 88-91, 97-98, 119-121, 132) The Bankruptcy Court resolved the conflicts in the evidence and specifically found that "[t]he evidence presented at trial clearly indicates that the parties had established a pattern and practice whereby [Walker] regularly signed [Corso's] name for the purpose of managing the parties' household affairs." (Docket No. 1-11 at 13).

In connection with their divorce, the parties executed a marital settlement agreement. (Docket No. 1-22, Plaintiff's Ex. 5). Pursuant to the settlement agreement, Walker agreed to satisfy "the outstanding parent plus school loans incurred for the parties' children's education." (*Id.* at § 3). Walker further agreed to "indemnify and hold harmless" Corso in relation to the student loan debts. (*Id.*). Corso presented evidence at trial, including testimony from the attorney who handled his divorce case, which suggested that Walker did not fully disclose the amount of the student loans during the divorce proceedings and negotiations. (Docket Nos. 1-25, 1-27, 1-29, Plaintiff's Exs. 8, 10, 12). From his view, the amount of the loans was only approximately $10,000.00, while in reality the amount was in excess of $40,000.00. (*Id.;* Docket No. 1-39 at 61-64). In contrast, Walker testified that the amounts of the loans were never discussed and that she felt threatened by her husband during the negotiations, leading to her agreement to pay for the outstanding student loans. (Docket No. 1-39 at 91-93, 113-115, 121-122). The marital settlement agreement, however, does not provide a specific amount owed on the outstanding student loans. (Docket No. 1-22, Plaintiff's Ex. 5).

Thereafter, Walker ceased making payments on the student loans. Collection efforts were then commenced against Corso by the creditors. (Docket No. 1-39 at 64-67, 69-70, 105, 108-109, 115-116; *see also* Docket Nos. 1-24, 1-26, 1-32, Plaintiff's Exs. 7, 9, 15). He started receiving collection letters and his Social Security income checks were garnished by the federal government. (*Id.*).

Walker filed a Voluntary Petition under Chapter 13 of the Bankruptcy Code on May 15, 2009. (*See* Bankruptcy No. 09-23605-JAD). Corso then initiated the instant adversary proceeding against Walker on September 11, 2009. (Docket No. 1-2). In his Complaint, Corso sought both a judgment in excess of $46,000.00 and a determination that such debts were nondischargeable under the Bankruptcy Code. (*Id.*). Walker filed an answer denying Corso's claims and also seeking attorney's fees and costs. (*See* Docket No. 1-11 at 16-17).

A trial was held before the Bankruptcy Court on September 14, 2010 as to the contested issues. At trial, Appellant maintained that the instant debts were nondischargeable under several theories, including that: (1) such debt qualifies as a nondischargeable education loan under 11 U.S.C. § 523(a)(8); (2) such debt arose from a false representation or fraud pursuant 842*842 to 11 U.S.C. § 523(a)(2), making it nondischargeable; and (3) such debt is nondischargeable because it was incurred pursuant to a divorce or separation agreement under 11 U.S.C. § 523(a)(15).

Subsequent to the trial, the Bankruptcy Court issued a Memorandum Opinion and Order denying all of Corso's claims. (Docket No. 1-11). The Bankruptcy Court found that the disputed debt could not be characterized as an education loan under § 523(a)(8) and was not within the exception under § 523(a)(2) because Walker's agreement to pay the student loans via the settlement agreement was not "money, property, services, or an extension, renewal, or refinancing of credit . . . obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). As a consequence, these claims of nondischargeability were dismissed, with prejudice. (Docket No. 1-11). The Bankruptcy Court also denied Corso's claim that the debts were nondischargeable under § 523(a)(15) because the obligations were incurred pursuant to a divorce or separation agreement. (*Id.* at 17). However, this claim was dismissed, without prejudice, given that the debt may be discharged if Walker "makes all plan payments on a confirmed plan in her Chapter 13 case." (*Id.* at 17). Finally, the Bankruptcy Court denied Walker's counterclaim for attorneys' fees and costs.[1] (*Id.* at 16-17).

Corso filed a Notice of Appeal with the Bankruptcy Court on November 5, 2010. (Docket No. 1). The record before the Bankruptcy Court was then produced and the Notice of Appeal and record were filed with this Court on January 5, 2011. (*Id.*). This Court entered an Order of Court setting forth the appellate briefing schedule on January 8, 2011. (Docket No. 3).

Pursuant to this Order, Corso filed his brief on January 24, 2011, (Docket No. 5), Walker filed her responsive brief on February 6, 2011, (Docket No. 6), and Corso filed his reply brief on February 22, 2011 (Docket No. 7). No further briefing has been submitted and the matter is fully briefed and ripe for disposition.

III. LEGAL STANDARD

This Court has appellate jurisdiction over final judgments, orders and decrees of a bankruptcy court pursuant to 28 U.S.C. § 158(a)(1). The Court reviews a bankruptcy court's findings of fact under a clearly erroneous standard and its conclusions of law under a *de novo* standard. *In re SubMicron Sys. Corp.,* 432 F.3d 448, 454 (3d Cir.2006).

IV. DISCUSSION

As noted, on appeal, Walker challenges both the factual findings of the Bankruptcy Court and its conclusions of law. (Docket Nos. 5, 7). In this Court's opinion, the alleged factual errors underlie and relate to the contested legal rulings. Therefore, the Court will address the parties' positions related to the Bankruptcy Court's factual findings first, and then discuss their arguments as to the supposed errors in the Bankruptcy Court's legal conclusions.

A. Factual Findings — Authorization of Walker to Sign Student Loans on Corso's Behalf

In its post-trial Memorandum Opinion, the Bankruptcy Court held that "[t]he evidence presented at trial clearly indicates 843*843 that the parties had established a pattern and practice whereby [Walker] regularly signed [Corso's] name for the purpose of managing the parties' household affairs." (Docket No. 1-11 at 13). Corso contests this finding. (Docket No. 5). He asserts that the Bankruptcy Court erred in determining that Walker was authorized to sign his name on the school loans and guarantees. (*Id.*). He maintains that the Bankruptcy Court failed to review the totality of the evidence and erred in its finding that Walker did not commit fraud by signing her husband's name, without his consent. (*Id.*). In response, Walker argues that the Bankruptcy Court correctly determined that she was authorized to sign on her husband's behalf and that this Court should give deference to the Bankruptcy Court's credibility determinations. (Docket No. 6).

This Court reviews a Bankruptcy Court's findings of fact under a "clearly erroneous" standard. A Bankruptcy Court's "findings of fact are clearly erroneous when, after reviewing the record, the appellate court `is left with the definite and firm conviction that a mistake has been committed.'" *In re Piccoli,* Civ. Action No. 06-2142, 2007 WL 2822001 (E.D.Pa. Sept. 27, 2007) (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (quoting *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948))). Under this standard, "[i]t is the responsibility of an appellate court to accept the ultimate factual determinations of the fact-finder unless that determination is either (1) completely devoid of minimum evidentiary support displaying some hue of credibility or (2) bears no rational relationship to the supportive evidentiary data." *DiFederico v. Rolm Co.,* 201 F.3d 200, 208 (3d Cir. 2000) (citations omitted). In reviewing the Bankruptcy Court's findings, the Court gives "due regard" to the Bankruptcy Court's credibility determinations. Fed.R.Bk.P. 8013.

In this Court's estimation, a fair reading of the record demonstrates that the Bankruptcy Court properly considered and exercised its discretion to weigh the evidence. The challenged factual findings hinged, in large part, on a credibility determination regarding the evidence presented to the Bankruptcy Court. As the trier of fact, the Bankruptcy Court was in a better position to evaluate the credibility of the witnesses than is this Court. *See* *In re Myers,* 491 F.3d 120, 126 (3d Cir.2007) ("The Bankruptcy Court is best positioned to assess the facts, particularly those related to credibility . . ."). Thus, this Court defers to the Bankruptcy Court's factual findings, which are not clearly erroneous and, indeed, are supported by the record. *SeeDiFederico,* 201 F.3d at 208.

The Court also rejects Corso's arguments that the Bankruptcy Court relied only on a single email[2] in support of its findings of fact and also ignored the evidence presented by Corso's former attorney. (Docket No. 5). Instead, the Bankruptcy Court's well-reasoned decision demonstrates that all of the relevant evidence was considered. The Bankruptcy Court simply found Walker's evidence on the issue more credible than the evidence Corso presented and sufficiently detailed the reasons for its findings. Specifically, the Bankruptcy Court held that:

Both [Walker] and all three of the parties' children unanimously testified that [Corso] had on several occasions, and for 844*844 a variety of purposes, authorized [Walker] to sign his name on documents concerning the parties' finances. In fact, the parties' children each testified it was a running household joke that [Corso] would never sign tax return documents out of fear of triggering an audit because his signature would not match [Walker's] version which typically appeared on the tax return documents.

. . .

Further, [Corso's] insistence that at the time the Loan Applications were signed, [Walker] was no longer authorized to sign his name is not credible. [Walker] produced an e-mail dated February 23, 2004, more than a year after the second Loan document was signed and less than three months prior to the execution of the Settlement Agreement, in which [Corso] explicitly authorized [Walker] to sign his name concerning the sale of a family vehicle. In addition, [Corso] admitted that he did not stop depositing his paychecks into the parties' joint bank account, over which [Walker] had full control, until the month prior to the execution of the Settlement Agreement. [Corso] also admitted that he and [Walker] had agreed to pay for their daughter's college expenses, and that [Corso] was aware [Walker] signed his name on certain student loans prior to entering into the Settlement Agreement. In sum, while [Corso] insists he did not specifically authorize [Walker] to sign his name on the Loan Applications, the evidence indicates that [Walker] was tasked with running the household, and was authorized to sign [Corso's] name for the purpose of doing so.

(Docket No. 1-11 at 13-14). These factual findings clearly support the Bankruptcy Court's conclusion that Walker was indeed authorized to sign her former husband's name on the loan applications.

Plaintiff argues that this evidence is undermined by the evidence presented by Corso's former attorney — who represented him in the subsequent divorce proceedings and negotiations. (Docket No. 5). However, this evidence was not relevant to the issue of whether Walker was authorized in the first instance to sign the loan applications on behalf of her former husband. At most, such evidence was relevant as to whether Walker's failure to disclose the true amount of the student loans constituted fraud or misrepresented facts to Corso during the negotiation of the divorce settlement.[3] Thus, the attorney's testimony does not undermine the factual findings relevant to the household practices and Walker's authorization to sign documents on his behalf, as Corso suggests.

For these reasons, the Bankruptcy Court did not err in its factual findings that Walker was authorized to sign her husband's name on the loan applications and parental guarantees.

B. Conclusions of Law — Applicability of Exceptions to Discharge under § 523(a)

The Court also holds that the Bankruptcy Court did not abuse its discretion in its interpretation and application of the relevant Bankruptcy Code provisions. Chapter 13 of the Bankruptcy Code permits the discharge of certain debts upon the debtor's completion of all payments under a reorganization plan approved by the Bankruptcy Court, subject to exceptions specifically delineated in the Code. *See* 11 U.S.C. § 1328(a).[4] Notably excepted 845*845 from discharge under these provisions include student loan debts under § 523(a)(8) and debts procured by fraud or false representations under § 523(a)(2)(A). *See* 11 U.S.C. § 523(a)(2)(A), (a)(8). However, debts incurred pursuant to a marital settlement agreement are not specifically excepted from discharge. *See* *In re Kennedy,* 442 B.R. 399, 401 (Bankr.W.D.Pa. 2010) (citing 11 U.S.C. § 1328(a)(2)) ("With respect to a `normal' discharge granted upon completion of a Chapter 13 plan, debts described in Section 523(a) (15) are not excepted from discharge although debts under Section 523(a)(5) are excepted from discharge."). Hence, such debts are dischargeable after the debtor's successful completion of a Chapter 13 reorganization plan. 11 U.S.C. § 1328(a).

"Statutory exceptions to discharge are generally construed `narrowly against the creditor and in favor of the debtor.'" *In re Mehta,* 310 F.3d 308, 311 (3d Cir.2002)(quoting *In re Pelkowski,* 990 F.2d 737, 744 (3d Cir.1993)). "The creditor opposing discharge therefore has the burden of establishing that an obligation is not dischargeable," *id.* (citing *Grogan v. Garner,* 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)), by a preponderance of the evidence, *Cadle Co. v. Zofko,* 380 B.R. 375, 382 (W.D.Pa. Jan.23, 2007).

The Bankruptcy Court determined that the debts in question did not fall within the exceptions raised by Corso, i.e., the debts were not student loan debts under § 523(a)(8) and were not procured by fraud, misrepresentations or false statements under § 523(a)(2)(A). (Docket No. 1-11). Instead, the Bankruptcy Court held that the debts were undertaken by Walker pursuant to a marital settlement agreement, and, thus dischargeable if she completed all payments under her Chapter 13 Plan. (*Id.*). This Court agrees with the Bankruptcy Court's conclusions.

1. *Student Loan Exception*

Initially, the Court dismisses Corso's argument that the challenged debt should be characterized as a nondischargeable student loan under § 523(a)(8). Section 523(a)(8), provides, in relevant part, that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . .

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual; 846*846 11 U.S.C. § 523(a)(8). This exception to discharge under § 523(a)(8) applies equally to both students and their guarantors or co-signers of the student loans. *In re Pelkowski,* 990 F.2d 737, 744 (3d Cir.1993). The United States Court of Appeals for the Third Circuit has recognized that Congress's purpose of excepting federally guaranteed student loan debts from discharge in bankruptcy was to prevent "reported abuses of students who obtained the benefits of higher education while avoiding repaying student loans by declaring bankruptcy shortly after graduation." *In re Mehta,* 310 F.3d at 312. By enacting § 523(a)(8), Congress sought to help "preserve the integrity of the student loan program" and, thus, protect creditors from the "legal loophole" which permitted the practice of students receiving the benefit of higher education and then discharging their student loans before they became "wage-earning members of the community." *Id.* at 744.

Given the statutory language, the aforementioned Congressional intent and the Court of Appeals' interpretation of same, it is clear to this Court that § 523(a)(8) does not apply in this case. Simply put, Corso is not a creditor protected by this provision and Walker is not a debtor prevented from discharging any debt, by its terms. *See* 11 U.S.C. § 523(a)(8). Based on the Bankruptcy Court's factual findings that Walker was authorized to execute the student loan applications and guarantees on behalf of Corso, which this Court has affirmed, Corso became the debtor and/or guarantor of the student loans.[5] In contrast, Walker never executed the documents herself; thus, she never guaranteed or obligated herself to pay the student loan debt directly to the lender. (*See* Docket Nos. 1-18, 1-19, Plaintiff's Exs. 1, 2). She only agreed to undertake her former husband's obligation to do so in the subsequent marital settlement agreement. (*See* Docket No. 1-22, Plaintiff's Ex. 5). Therefore, the decisions relied upon by Corso, *In re Pelkowski,* 990 F.2d 737 (3d Cir. 1993) and *In re Kuschel,* 365 B.R. 910 (Bankr.E.D.Mo.2007), are distinguishable. In each of these cases, the debtors were bound by the loan terms and directly liable to the creditors, i.e., the debtor-mother in *In re Pelkowski* signed a parental guarantee for her child's student loan and the debtor-spouse in *In re Kuschel* was a party to the consolidation note obligating her to pay the debt consisting of both her and her husband's student loan debts.[6] *See In re Pelkowski,* 990 F.2d at 738; *In re Kuschel,* 365 B.R. at 912. In addition, the 847*847 creditors in both *In re Pelkowski* and *In re Kuschel* were the lenders which made the loans, the Ohio Student Loan Commission, and the Pennsylvania Higher Education Assistance Agency, respectively. *Id.*

Because of the parties' relationship vis-à-vis the outstanding student loan debts, the purposes of § 523(a)(8) are not frustrated by a discharge of the disputed debts in this case. *See In re Segal,* 57 F.3d 342, 349-50 (3d Cir.1995). Corso remains obligated to pay the outstanding student loans and the creditors can continue to collect the outstanding debt directly from him.[7] (*See* Docket No. 1-18, 1-19, Plaintiff's Exs. 1, 2). On the other hand, Walker has no such obligation directly to the creditors. (*Id.*).

As the Bankruptcy Court recognized, Walker's subsequent agreement to pay the student loans was made pursuant to a marital settlement agreement and became a personal obligation she owed to her former husband, not to the lender. (*See* Docket No. 1-22, Plaintiff's Ex. 5). Corso maintains that common law theories of third party beneficiaries to contracts and/or surety law demand a different result. (Docket Nos. 5, 7). However, he cites no binding authority importing these concepts into the exception under § 523(a)(8). Again, the Bankruptcy Court and, in turn, this Court, are tasked with applying the plain language of the statutory exceptions and are to construe said exceptions "narrowly against the creditor and in favor of the debtor." *In re Mehta,* 310 F.3d at 311. Applying these principles, the statutory exception under § 523(a)(8) may not be invoked by an individual creditor such as Corso, who has never made any student loan, against a debtor who is not obligated to pay the student loan debts directly to the lender.

In sum, the Bankruptcy Court did not abuse its discretion by holding that the exception under § 523(a)(8) did not apply based on the facts and circumstances of this case.

2. *Exception Based on Alleged Fraud, False Statements, False Representations*

Likewise, this Court finds that the Bankruptcy Court properly exercised its discretion in denying Corso's claim that the disputed debts were nondischargeable under § 523(a)(2)(A). Section 523(a) (2)(A) provides that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

. . .

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]

11 U.S.C. § 523(a)(2)(A). The purposes of this exception are to distinguish the "honest debtor," who is entitled to a discharge from his or her debts and a fresh start under the Bankruptcy Code from a debtor who has committed fraud on his creditors, who does not merit a fresh start, and to protect creditors from fraud. *See In re Cohen,* 106 F.3d 52, 59 (3d Cir.1997). The creditor has the burden of proof to show848*848 that all elements of § 523(a)(2)(A) are met. *In re Larson,* 2009 WL 2144079, at *3 (D.N.J.2009) (citing *Grogan v. Garner,* 498 U.S. 279, 288-89, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). Those elements are that:

1. the debtor made a false representation;

2. at the time of the representation, the debtor knew it was false;

3. the false representation was made with the intent and purpose of deceiving the creditor;

4. the creditor justifiably relied upon the representation; and

5. the creditor sustained damages as a proximate result of the misrepresentation.

In re Ritter, 404 B.R. 811, 822 (Bankr. E.D.Pa.2009).

Corso's arguments as to nondischargeability under § 523(a)(2)(A) are two-fold: (1) that Walker committed fraud on the lenders when she signed her former husband's name on the initial applications and guarantees; and (2) that Walker committed fraud or misrepresented the value of the student loans to Corso during the negotiation of the marital settlement agreement. (Docket Nos. 5, 7). The Bankruptcy

Court rejected both arguments, reasoning that Corso failed to meet his burden of proof to demonstrate that the debts were nondischargeable under either theory. (Docket No. 1-11). We agree with this analysis.

At the outset, the Court finds that the Bankruptcy Court correctly determined that in light of *Archer v. Warner,* 538 U.S. 314, 123 S.Ct. 1462, 155 L.Ed.2d 454 (2003), § 523(a)(2)(A) potentially covered claims of fraud or false representations committed during an initial transaction or a later settlement agreement resolving a prior fraud claim. In addition, the record supports the Bankruptcy Court's conclusion that Corso failed to meet his burden of proof under either theory.

With respect to the alleged fraudulent conduct by Walker signing her husband's name on the initial applications and guarantees, for the reasons set forth above, this Court affirms the Bankruptcy Court's decision that Walker was authorized to sign them on Corso's behalf pursuant to a long-standing household practice.[8] Thus, this Court give "due regard" to the Bankruptcy Court's finding that there was no credible evidence that any fraud, misrepresentation or false statement was committed by Walker when she executed these documents.

Moreover, to the extent that Corso argues that the alleged fraud under § 523(a)(2)(A) may be predicated on Walker's nondisclosure to the lenders that she signed her husband's name on the loan applications and the guarantees, Corso lacks standing to pursue such a claim. Section 523(c)(1) provides that a debt may be challenged under § 523(a)(2)(A) if a debtor "obtained money, property, services or [credit]" from a "creditor to whom such debt is owed." 11 U.S.C. § 523(c)(1). "[O]nly debt that is obtained by fraudulent conduct is within the scope of § 523(a)(2)(A)." *In re Glen,* 639 F.3d 530, 532 (8th Cir.2011). And, the alleged fraudulent conduct and/or misrepresentation must be made by the debtor to the creditor concurrent with the transfer. *In re Glen,* 639 F.3d 530, 532. By virtue of these provisions, a creditor's standing to invoke § 523(a)(2)(A) is limited to fraud claims stemming from its own transfers to the debtor and is therefore precluded from seeking exceptions to the discharge of debts based on fraudulent activity allegedly committed by the debtor against third 849*849 parties. *See e.g., In re Glen,* 639 F.3d 530 at 532 (holding that alleged fraud by the debtor on third party lenders did not support a creditor's claim under § 523(a)(2)(A)); *In re Fabian,* 1989 WL 18109, at *3 (Bankr.W.D.Pa. Feb.28, 1989) ("there is no basis upon which [a creditor] has standing to bring an action against a third party."); *In re Terranova,* 301 B.R. 509 (Bankr.N.D.Ill. Nov.12, 2003)(holding that "a creditor may [not] seek an exception from discharge for debts owed to another creditor.").

The Court further holds that the Bankruptcy Court did not abuse its discretion by dismissing Corso's claim to the extent he argues that Walker's alleged conduct during the negotiation of the settlement agreement excepted the challenged debt under § 523(a)(2)(A). As the Bankruptcy Court detailed, this claim fails for multiple reasons.

First, although Corso transferred a lump sum of money to his wife in conjunction with the marital settlement agreement, he admitted that his claim against her in the adversary proceeding was limited to recovery of the amount of the outstanding student loans. (Docket No. 1-39 at 21-22). Walker agreed to satisfy these loans pursuant to the marital settlement agreement and to indemnify and hold him harmless regarding said debts. (Docket No. 1-22, Plaintiff's Ex. 5). Section 523(a)(2)(A) is only applicable if a creditor transfers "money, property, services or an extension, renewal, or refinancing of credit" to the debtor and recovery is limited only "to the extent that" said transfer was "obtained by fraud." 11 U.S.C. § 523(a)(2)(A). Thus, because Corso sought only to enforce his wife's obligation to pay the outstanding loans on his behalf, which did not involve the transfer of money, property or services to Walker, the plain language of § 523(a)(2)(A) was not invoked and the Bankruptcy Court properly denied Corso's claim on this basis. *See* *In re Glen,* 639 F.3d 530 at, *3 (holding that reduction of value of equity in real estate is not sufficient to invoke the exception under § 523(a)(2)(A)); *In re Thompson,* 354 B.R. 174, 179 (Bankr.E.D.Tenn. Nov.1, 2006) (holding that assumption of liabilities in purchase agreement did not constitute money obtained by the debtor through misrepresentations).

Second, Corso makes much of Walker's alleged failure to disclose the true amount of the outstanding student loans at the time of the negotiation of the settlement agreement.[9] However, Corso ignores the unambiguous provisions of the marital settlement agreement, which state that Walker agreed to satisfy the outstanding student loans, without Specifying the amounts due. (Docket No. 1-22, Plaintiff's Ex. 5). Pursuant to these provisions, Walker was obligated to pay the entire balance of the outstanding student loans, regardless of the amount. (*Id.*).

Third, because Corso failed to meet his burden to demonstrate that the challenged debt was transferred to Walker based on fraud, misrepresentations or false statements, he could not meet his burden to 850*850 prove the remaining elements under § 523(a)(2)(A), including that he justifiably relied on Walker's conduct to his detriment. *See* *In re Ritter,* 404 B.R. at 822.

For these reasons, the Bankruptcy Court did not abuse its discretion by denying Corso's claim under § 523(a)(2)(A).

3. *Exception Under § 523(a)(15)*

In summary, the Bankruptcy Court correctly concluded that the challenged debts arose from Walker's obligations under the parties' marital settlement agreement, making § 523(a)(15) applicable. Pursuant to 11 U.S.C. § 1328(a), such debts are dischargeable if Walker completes the payments under her Chapter 13 Plan. *See* 11 U.S.C. § 523(a)(15). Therefore, Corso's claim under § 523(a)(15) was appropriately dismissed, without prejudice.

V. CONCLUSION

Based on the foregoing, Corso's appeal is DENIED and the October 22, 2010 Order of the Bankruptcy Court is AFFIRMED. An appropriate Order follows.

[1] Walker has not filed a cross-appeal challenging this ruling. Thus, the Court will not consider same on appeal.

[2] Corso's email to Walker, dated February 23, 2004, stated that "[t]he van you can sell without me. Just sign my name. I thought $100 per pay was going into that account." (Docket No. 1-13 at 4).

[3] The Bankruptcy Court rejected this argument as well, finding that the amount was not relevant to the disposition of Corso's claims. *See* § IV.B.2, *infra.*

[4] 11 U.S.C. § 1328(a) provides, in relevant part, that:

as soon as practicable after completion by the debtor of all payments under the plan. . . unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

. . .

(2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);

11 U.S.C. § 1328(a).

[5] *See* § IV.A., *supra.*

[6] Corso highlights the Bankruptcy Court's analysis in *In re Kuschel* that the debtor claimed that she did not initially sign the challenged loan documents but later ratified same in accord with Missouri law as a consequence of her subsequent agreement to pay the debts under a divorce property settlement agreement. (Docket No. 7). He then argues that *In re Kuschel* is analogous to this case given that Walker did not sign the outstanding loan documents but subsequently agreed to pay them in the marital settlement agreement. (*Id.*). This Court does not read *In re Kuschel* so broadly. As this Court understands it, the debtor in that case was a named party to the loan consolidation agreement but she disputed whether she had signed her own name on the applications. *In re Kuschel,* 365 B.R. at 915. Despite this apparent dispute, the Bankruptcy Court found that her subsequent conduct in entering into a forbearance agreement with the lender and agreeing to pay the debts under a divorce settlement agreement ratified her existing obligations under the student loan consolidation agreement. *Id.* Here, Walker was never a party to the outstanding student loan agreements and did not enter into any subsequent forbearance agreements with the lenders. This distinction is subtle, but dispositive. Moreover, even if Corso's summation of *In re Kuschel* is accurate, the decision is non-binding and this Court does not find it persuasive.

[7] To the extent that Corso maintains that payment of the student loans presents him with a financial hardship, the same would only be relevant if Corso was the debtor who sought a discharge of the debts in bankruptcy. *See* 11 U.S.C. § 523(a)(8) (providing that student loan debts are not dischargeable "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents").

[8] *See* § IV.A., *supra.*

[9] The Court notes that although the Bankruptcy Court ruled that § 523(a)(2)(A) did not apply, it did not explicitly resolve the apparent conflict in the evidence regarding whether the amounts of the outstanding student loans were ever discussed during the negotiations between Corso, his attorney Zagardi, Walker and her lawyer Kasbee. Walker testified unequivocally that the amount of the outstanding student loans was not mentioned at all. (Docket No. 1-39 at 90-91, 113-115). Indeed, she stated that she felt threatened by her former husband and that she agreed to pay for the loans because Corso threatened to return to Brazil and walk away from the house that the jointly owned; thereby preventing Walker from being able to sell the house without his agreement and signature. (*Id.*).

In re Hixson, 450 BR 9 - Bankr. Court, SD New York 2011

450 B.R. 9 (2011)

In re John HIXSON, Debtor.
John Hixson, Plaintiff,
v.
U.S. Department of Education, Defendant.

Bankruptcy No. 05-47016 (AJG), Adversary No. 06-01349 (AJG).

United States Bankruptcy Court, S.D. New York.

March 24, 2011.

12*12 Pirro and Church, By: Karen Marie Tobin, Esq., Norwalk, CT, for Plaintiff.

Preet Bharara, U.S. Attorney for the Southern District of New York, By: Serrin Turner, Esq., Assistant U.S. Attorney, New York, NY, for Defendant.

OPINION GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

ARTHUR J. GONZALEZ, Chief Judge.

Before the Court are cross-motions filed by the plaintiff, John Hixson (the "Plaintiff" or "Hixson" or the "Debtor") and the U.S. Department of Education (the "DOE" or the "Defendant") seeking summary judgment on the issue of whether a portion of an educational consolidation loan (the "Consolidation Loan") corresponding to the amount obtained by his ex-wife to finance her education, for which entire amount the Plaintiff and his ex-wife are jointly and severally liable, may be discharged under section 523(a)(8)[1] of the Bankruptcy Code on the basis of undue hardship. In particular, the Plaintiff does not contend that the amount of the Consolidation Loan that corresponds to his own educational loan is dischargeable. Rather, he argues that the portion of the Consolidation Loan corresponding to his ex-wife's education should be discharged because he is not the beneficiary of the education for which the debt was incurred and that rendering that portion of the Consolidation Loan non-dischargeable imposes an undue 13*13 hardship that meets the three-prong *Brunner* test.[2] Thus, he believes he is entitled to a discharge of that portion of the Consolidation Loan that corresponds to the amount of his ex-wife's loan.

There is no genuine issue as to any material fact. After considering the Parties' cross-motions for summary judgment and the Parties' joint stipulation of facts (the "Stipulation"), because the application of the plain meaning of the statute requires a showing of undue hardship, regardless of whether each of the co-obligors was the initial borrower under a loan that was subsequently consolidated, and because the Plaintiff has failed to meet the *Brunner* test with respect to the Consolidation Loan, or any portion thereof, the Court finds that the DOE is entitled to judgment as a matter of law.

I. Jurisdiction and Venue

The Court has subject matter jurisdiction over this adversary proceeding under sections 1334(a) and (b) and 157(a) and (b) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of

Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.). This is a core proceeding within the meaning of section 157(b)(2)(I) and (J) of title 28 of the United States Code. Venue is proper before this Court pursuant to section 1409(a) of title 28 of the United States Code.

II. Procedural History

On October 14, 2005, the Debtor filed a voluntary chapter 7 petition. On March 14, 2006, the Debtor initiated an adversary proceeding against the DOE. The Adversary Proceeding Cover Sheet indicated that the nature of the suit was a motion to discharge a student loan due to hardship. (ECF No. 1.) The verified complaint (the "Verified Complaint") relating to the adversary proceeding (the "Adversary Proceeding") was filed the next day on March 15, 2006. (ECF No. 2.) On June 8, 2006, the DOE filed an Answer to Amended Complaint.[3] At a pre-trial conference on December 6, 2006, each side sought to file summary judgment motions. Both sides argued that a hearing on the motions was not necessary and that the Court could rule based upon the pleadings that would be filed in support of the corresponding motions. Thereafter, the parties (the "Parties") both filed their pleadings with the Court on January 22, 2007. The DOE then filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on February 5, 2007. (ECF No. 10.)

No hearing took place and the matter was taken "under advisement." However, the Court failed to place this matter on its *sub judice* (under advisement) list and, as a result, the continued pendency of the matter went unnoticed. Recently, upon a general review of motions pending on its docket, it came to the Court's attention that the summary judgment motions had not been decided.[4]

14*14 **III. Facts**

Hixson is a musician who trained at the Julliard School. He majored in Clarinet and graduated with a masters degree in 1994 and a doctoral degree in 1998. (Stip. 2 ¶ 6.) On March 16, 1999, Hixson and Ulla Suokko ("Suokko," and together with Hixson, the "Spouses"), to whom he was then married, obtained the Consolidation Loan from the DOE. (*Id.* at 1 ¶ 1.) The Consolidation Loan represented amounts totaling $91,566 that Hixson originally borrowed and amounts totaling $47,551 that Suokko originally borrowed. (*Id.* ¶ 2.) Hixson signed as the borrower for the Consolidation Loan and Suokko co-signed as his spouse. (*Id.* at 2 ¶ 4.) They later divorced in October 2000. (*Id.*) The promissory note (the "Note") for the Consolidation Loan contains provisions specific to a consolidation loan entered into jointly between a borrower and a spouse. (*Id.* ¶ 5.) Significantly, the Note provides that the Spouses

confirm that [they] are legally married to each other and understand and agree that [they] are and will continue to be held jointly and severally liable for the entire amount of the debt represented by the Federal Direct Consolidation Loan without regard to the amounts of [their] individual loan obligations that are consolidated *and without regard to any change that may occur in [their] marital status.* ... [They] understand that this means that one of [them] may be required to pay the entire amount due if the other is unable or refuses to pay.

(*Id.*) (Emphasis supplied.)

As of the Stipulation dated January 12, 2007, Hixson worked full-time as the Senior Account Executive for Patron Technology, an online marketing software and consulting company serving the arts and culture industry. (*Id.* ¶ 7.) For the year 2005, Hixson's W-2 Wage and Tax Statement reported total compensation of $58,301.68 from Patron, less $19,243.61 in withheld taxes, resulting in an average pay of approximately $3,255 per month after taxes. (*Id.*) As of 2007, Hixson's earnings from his position at Patron Technology are comparable to the 2005 figures. (*Id.* at 3 ¶ 7.) Hixson also earns additional money as a part-time professional musician. (*Id.* ¶ 8.) His average monthly expenses, which total approximately $1,983 per month, include expenses for the following: rent, food, clothing, laundry, medical and dental expenses, transportation, recreation, clubs, entertainment, newspapers, and magazines, charitable contributions, and business-related expenses. (*Id.* ¶ 9.) The Parties stipulate that Hixson is in good health, has no dependents, and is able to afford a minimal standard of living in his present circumstances.[5] (*Id.* ¶¶ 10, 11, 12.)

From June 1999 to December 2000, Hixson made eleven payments on the loan of15*15 approximately $440 each. (*Id.* ¶ 13.) He stopped making voluntary payments on the Consolidation Loan after December 2000. (*Id.*) From October 14, 2004 through November 3, 2005, the DOE garnished Hixson's wages in bi-weekly payments ranging from $221.55 to $584.70. (*Id.*) On October 14, 2005, after Hixson filed his Chapter 7 bankruptcy petition, he received a refund in the amount of $702.15 for wages garnished after the bankruptcy filing. (*Id.*) Unlike Hixson, Suokko never made any payments on the Consolidation Loan, and as of the date of the Stipulation in January 2007, the DOE had not pursued collection payments from her. (*Id.* ¶ 14.)

The Parties stipulate that as of December 13, 2006, the outstanding balance on the Consolidation Loan was $195,229.41 and that the interest rate on the Consolidation Loan was 5.30 percent. (*Id.* ¶ 15.) Additionally, assuming an Adjusted Gross Income of $58,301, Hixson would be required to repay the outstanding balance on the Consolidation Loan under a standard plan (the "Standard Plan") or income contingent payment plan (the "Income Contingent Plan"). (*See id.* at 4 ¶ 16.) Under the Standard Plan, Hixson would make monthly payments of $2,099.45 over a 120-month term, totaling $251,934, inclusive of principal and interest. (*Id.*) Under the Income Contingent Plan, Hixson would make monthly payments of $808.35 over a 251-month term, totaling $356,362.49, inclusive of principal and interest. (*Id.*) These amounts were derived from the "Income Contingent Repayment Calculator" accessible from the DOE website. (*See id.*)

Finally, the Parties stipulate that should Hixson remarry, the payments required under the Income Contingent Plan would be adjusted to take into account the greater size of his household and any income earned by his future spouse. (*Id.* ¶ 17.)

IV. Discussion

Summary Judgment

Rule 56(a) of the Federal Rules of Civil Procedure, incorporated into bankruptcy practice by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A party asserting "that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of material in the record ...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1).

"Rule 56(a) specifies that to preclude summary judgment, the fact in dispute must be material. Substantive law determines the facts that are material." *Cordius Trust v. Kummerfeld (In re Kummerfeld),* No. 09 B 16267(AJG), Adv. No. 10-2841(AJG), 2011 WL 108339, at *9 (Bankr. S.D.N.Y.2011) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "If a fact is material, it is necessary to see if the dispute about that material fact is genuine, `that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* (quoting *Anderson v. Liberty Lobby,* 477 U.S. at 248, 106 S.Ct. 2505). "If the fact may be reasonably resolved in favor of either party, then there is a genuine factual issue that may only be resolved by the trier of facts and summary judgment will be denied." *Id.* (citing *Anderson v. Liberty Lobby,* 477 U.S. at 250, 106 S.Ct. 2505). "If, however, the evidence `is so one-sided that one party must prevail as a matter of law,' then summary judgment will be 16*16 granted." *Id.* (quoting *Anderson v. Liberty Lobby,* 477 U.S. at 251-52, 106 S.Ct. 2505).

The Parties agree that there are no genuine issues of material fact, having entered into the Stipulation and thereafter filing cross-motions for summary judgments. There are only two issues for the Court to resolve. First, the Court must decide whether the undue hardship standard under section 523(a)(8) of the Bankruptcy Code applies in the same manner to an obligor under a consolidation loan regardless of whether that obligor was the borrower of a loan that a debtor became liable for as a result of consolidation of that person's loans with those of a spouse. Stating the issue another way, whether the undue hardship analysis includes facts and circumstances regarding whether a co-obligor under a consolidated loan actually received an educational benefit for each of the loans subject to the consolidation. Second, the Court must decide whether requiring a debtor to remain liable for a consolidated loan, including a portion corresponding to the amount obtained by a co-obligor to finance the non-debtor co-obligor's education, would result in an undue hardship pursuant to section 523(a)(8) of the Bankruptcy Code under the three-prong *Brunner* test.

Undue Hardship Standard Applies to Each Co-obligor on the Consolidation Loan

Hixson argues in the Brief in Support of Plaintiff's Motion for Summary Judgment that while "ordinarily he would be required to prove that the discharge of his student loan would be contingent upon a showing of `undue hardship' pursuant to 11 U.S.C. 523(8)(a) [sic], he should be awarded a discharge of the portion of his loans attributable to Ella Suokko," since failure to except the portion of the Consolidation Loan corresponding to Suokko's education would be contrary to the intent of the drafters. Hixson contends that it is not the purpose of the statute to burden someone such as himself with a debt which he "never `rightfully owed'."[6] He cites to, *inter alia, Griffin v. Oceanic Contractors,* 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) to support his argument that a strict application of the *Brunner* test is inapposite in his situation, where it would result in "an outcome completely in contradiction to the intent of the ... drafters." Hixson reasons that a plain reading of the statute would produce a result contrary to the intent of the drafters because the exception to dischargeability was not meant to allow a student to derive an education by obtaining an educational loan, to subsequently shift liability to one's spouse who is himself a student, and to thereafter "walk away from any responsibility for the loan," thus enjoying the benefits of the education for which the loan was incurred.

The DOE responds that this Court does not have the discretion to ignore the "undue hardship" requirement as set forth under section 523(a)(8). They argue that Hixson is not entitled to a discharge of the Consolidation Loan corresponding to his wife's education because section 523(a)(8) does not turn on whether the debtor was the beneficiary of the Consolidation Loan. 17*17 Since the statutory text is unambiguous, reference to legislative history is not required, and, to the extent legislative history is used to interpret the provision, the purpose of the statute supports its plain meaning. The DOE further contends that section 523(a)(8) makes no distinction between a debtor who received the benefit of the education and a debtor who was not a beneficiary of the loan. Drawing such a distinction, they argue, would undermine the purpose of the statute.

The U.S. Supreme Court has acknowledged in *Griffin* that where the literal application of a statute produces a result "demonstrably at odds with the intentions of its drafters ... those intentions should be controlling." *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. at 571, 102 S.Ct. 3245. In such a case, the spirit of the law, rather than its plain meaning, should govern. *Stein v. Bank of New England, N.A (In re Stein),*218 B.R. 281, 286 (Bankr. D.Conn.1998). Here, the application of section 523(a)(8) does not conflict with the intentions of the drafters, nor does the spirit of the law conflict with the plain meaning of the statute.

While it is true that Congress intended to prevent those who borrow to obtain the benefit of a superior education from receiving a discharge of the obligation to repay the loan, "legislative history clearly bears out that the broad purpose of the provision was to keep our student loan programs intact." *In re Karben,* 201 B.R. at 684 (internal quotation marks omitted). Section 523(a)(8) and its legislative history do not specifically reference a situation where a co-obligor on an educational loan would not be the person who received the benefit of the loan. The statute's historical context shows a Congressional concern over the abuse of the bankruptcy laws by individuals who obtain student loans to finance their education and who subse-quently file bankruptcy petitions in order to obtain a discharge without any attempt to repay the loan. *Correll v. Union Nat'l Bank of Pittsburgh (In re Correll),* 105 B.R. 302, 304 (Bankr.W.D.Pa.1989). "[L]egislative history indicates a Congressional policy of excepting discharge in those inequitable situations where debtors with superior education and employment skills were intentionally abusing the fresh start policies ... [of] the bankruptcy laws." *Id. Accord* *In re Wells,* 380 B.R. at 659. The statute was also enacted "to preserve the financial integrity of the loan system by assuring the availability of monies to students in the future." *In re Wells,* 380 B.R. at 659 (citing*Kentucky Higher Educ. Assist. Auth. v. Norris (In re Norris),* 239 B.R. 247, 253 (M.D.Ala. 1999); *In re Hamblin,* 277 B.R. at 682). Holding Hixson liable for the educational loan of his ex-wife would not conflict with, or be contrary to, either purpose of the statute, i.e., keeping government educational loan programs intact and preventing abuse of the bankruptcy laws.

"In the absence of clearly expressed contrary legislative intent, the statutory language must be regarded as conclusive." *In re Pelkowski,* 990 F.2d 737, 741 (3d Cir.1993) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980); *United States v. Bey,* 736 F.2d 891, 893 (3d Cir.1984)). The language of section 523(a)(8) is unambiguous. *See e.g.,**Hamblin v. Educ. Credit Mgmt. Corp. (In re Hamblin),* 277 B.R. 676, 679 (Bankr.S.D.Miss.2002). *Accord* *Wells v. Sallie Mae (In re Wells),* 380 B.R. 652, 659 (Bankr.N.D.N.Y.2007). Its plain meaning shows that "educational loans are non[-]dischargeable regardless of whether the borrower was the student." *In re Stein,* 218 B.R. at 286. Section 523(a)(8) "does not refer to a `student debtor' but 18*18 applies to limit discharge of any `individual debtor' from `any debt' for a covered educational loan." *In re Pelkowski,* 990 F.2d at 741. "The relevant inquiry into the applicability of this section is the purpose of the loan, not the beneficiary of the education." *Educ. Res. Inst., Inc. v. Varma (In re Varma),* 149 B.R. 817, 818 (N.D.Tex.1992). *Accord* *In re Wells,* 380 B.R. at 659 (citing *Palmer v. Student Loan Fin. Corp. (In re*

*Palmer),*153 B.R. 888, 895 (Bankr.D.S.D.1993); *Karben v. Elsi (In re Karben),* 201 B.R. 681, 685 (Bankr. S.D.N.Y.1996)). Holding Hixson liable for the educational loan of his ex-wife comports with the plain meaning of the statute, which excepts from discharge any debt incurred by an individual debtor for an educational loan covered by the statute.

Section 1078-3 on federal consolidation loans of title 20, chapter 28 of the United States Code[7] provides the statutory authority for married couples to agree to be held jointly and severally liable for the repayment of a consolidation loan by, among other things, treating the couple as an "individual." Specifically, section 1078-3(a)(3)(C)(i) provides:

A married couple, each of whom has eligible student loans, may be treated as if such couple were an individual borrowing under subparagraphs (A) and (B) [defining "eligible borrower" and when the status of an "eligible borrower" terminates] if such couple agrees to be held jointly and severally liable for the repayment of a consolidation loan, without regard to the amounts of the respective loan obligations that are consolidated, and without regard to any subsequent change that may occur in such couple's marital status.

20 U.S.C.A. § 1078-3(a)(3)(C)(i) (Westlaw 2011), *stricken by* Deficit Reduction Act of 2005, Pub.L. No. 109-171, 120 Stat. 164 § 8009 (2006).

Had Congress thought it necessary to ameliorate the effects of the undue hardship standard for a loan incurred by the other spouse upon which the debtor-spouse becomes liable, particularly after a change in marital status, then Congress would have amended section 523(a)(8) to reflect such policy. However, Congress did not do so.

Hixson's argument that the portion of the Consolidation Loan corresponding to his ex-wife's education should be excepted from discharge is based on an interpretation of the statute that is contrary to its plain meaning, which plain meaning excepts from discharge any debt of an individual debtor, as long as it is an educational loan contemplated by the statute. It is undisputed that Hixson signed as the borrower for the Consolidation Loan. (Stip. 2 ¶ 4.) It is also undisputed that the loans are "student loans" that were consolidated under a "Federal Direct Consolidation Loan" program of the DOE. (*Id.* at 1 ¶ 1.) Thus, because the application of the plain meaning of the statute requires a showing of undue hardship by a debtor, regardless of whether that debtor, as a co-obligor, received the educational benefit of each loan that was subsequently consolidated, the Debtor must demonstrate that he has satisfied the three-prong *Brunner* test.

Application of the Brunner Test

Hixson asserts that the burden of having to pay his ex-wife's student loan as well as his own imposes an undue hardship that meets the three-prong *Brunner* test, thus entitling him to a discharge of that portion of the Consolidation Loan corresponding to his ex-wife's loan. The DOE, in contrast, argues that Hixson can pay off the 19*19entire amount of the Consolidation Loan without undue hardship.

The *Brunner* test, which is the controlling precedent in the Second Circuit, *see In re Stein,* 218 B.R. 281, 287 (Bankr. D.Conn.1998), provides that a finding of "undue hardship" to except an educational loan from discharge requires a three-part showing:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396.

The Debtor has the burden of proving the *Brunner* elements by a preponderance of the evidence. *In re Wells,* 380 B.R. at 658.

Hixson argues, *inter alia,* that he has satisfied the *Brunner* test because: (a) the fact that the basis for the debt was a loan program that was "short-lived" and that he belongs to a small class of debtors whose marriages later resulted in divorce, show that he is faced with "unique" and "exceptional" circumstances; (b) the result of collection efforts by the DOE would result in Hixson paying for the education of a former wife, and would result in his future wife and future children paying the portion of Suokko's loan; (c) circumstances rendering him unable to benefit from the education obtained by Suokko will not change, noting that he would never benefit from it at the outset; and (d) he is acting in good faith because he has availed himself of the Income Contingent Plan and has allowed the garnishment of his wages to satisfy the Consolidation Loan.

Hixson does not contend that the amount of the Consolidation Loan that corresponds to his own educational loan is dischargeable. Rather, he argues that the portion of the Consolidation Loan corresponding to his ex-wife's education should be discharged because he is not the beneficiary of the education for which the debt was incurred.[8]As noted above, however, whether the Consolidation Loan was made for the benefit of Hixson's ex-spouse is irrelevant to the *Brunner* analysis. The first and second prongs of the *Brunner* test weigh the debtor's ability to repay the loan, while the third prong considers the debtor's history of repayment. The test does not require an analysis of the manner in which the loan was incurred. Any such extension of the *Brunner* test would be 20*20 inconsistent with the plain meaning of section 523(a)(8).

(1) Minimal Standard of Living

The first prong of *Brunner* requires a showing that "the debtor cannot maintain, based on current income and expenses, a `minimal' standard of living for [himself] and [his] dependents if forced to repay the loans[.]" *Brunner,* 831 F.2d at 396. This prong "requires more than a showing of tight finances," *Penn. Higher Educ. Assist. Agency v. Faish (In re Faish),* 72 F.3d 298, 306 (1995), and is not met "merely because repayment of the borrowed funds would require some major personal and financial sacrifices." *Id.* However, "[w]here a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures is still unbalanced, a hardship exists from which a debtor may be discharged of his student loan obligations." *In re Correll,* 105 B.R. at 306. "[T]his test requires the Court to examine the Debtor's current income and expenses and determine a flexible minimal standard of living level sensitive to the particular circumstances of each case through the application of common sense." *In re Stein,* 218 B.R. at 287.

Hixson cites the district court decision of *In re Brunner,* 46 B.R. 752, 755 (S.D.N.Y. 1985) (the "District Court Decision"), which was affirmed by the Second Circuit, in support of his argument that he has satisfied the *Brunner* test insofar as he is faced with "unique" and "exceptional" circumstances because the basis for the debt was a loan program that was "short-lived,"[9] and because he belongs to a small class of debtors whose marriages later resulted in divorce. (Pl.'s Mem. 5.) Thereafter, Hixson discusses how he has met the second and third prongs of the *Brunner* test. (*See* Pl. Mem. 6.)

However, Hixson raises the issue of unique and exceptional circumstances under the wrong prong in the *Brunner* test, and uses it out of context. In his argument, Hixson misreads the sentence in the District Court decision that provides: "this test has been formulated as the necessity of showing `unique' or `exceptional' circumstances." *In re Brunner,* 46 B.R. at 755. The phrase "this test" does not refer to the *Brunner* test in its entirety, and does not require a showing of "unique" or "exceptional" circumstances under which the loan was incurred, but to the second prong of the *Brunner* test, which requires a showing of unique and exceptional circumstances demonstrating that the debtor's "current inability to pay will extend for a significant portion of the repayment period of the loan." *In re Brunner,* 46 B.R. at 755. *Accord In re Brunner,* 831 F.2d at 396 (affirming the District Court Decision).

Hixson further argues that requiring him to pay for the portion of the loan corresponding to Suokko's education would constitute an undue hardship because he would be paying for the loan of someone to whom he is no longer married, which would also impose a hardship on his future 21*21 wife and future children, who would be burdened by his former wife's loan. In considering whether a debtor would be able to maintain a minimal standard of living, a court will ascertain future expenses from an extrapolation of present needs. *In re Brunner,* 46 B.R. at 754, *aff'd* 831 F.2d 395 (2d Cir.1987). Thus, the appropriate place to take into consideration a known future change in the debtor's finances is the first prong of the *Brunner* test. *See In re Harris,*103 B.R. 79 (Bankr.W.D.N.Y.1989) (considering in the first prong of the *Brunner* test future increased weekly child support payments due to the pending birth of debtor's third child).[10]

However, Hixson does not present any calculations to support his argument that he would be unable to maintain a minimal standard of living, based on his current income and expenses, were he to remarry. Even if Hixson were to provide such calculations as to the impact a future wife and child would have on his ability to maintain a minimal standard of living, such calculations would have been purely speculative and would not have an impact on this Court's analysis under the first prong of the *Brunner* test.*See generally In re Brunner,* 46 B.R. at 754 (recognizing that marriage is unpredictable and could "quickly wreck havoc with [a] budget" but also noting that it is this very unpredictability of future finances that led courts to require the debtor to demonstrate "additional circumstances which *strongly suggest* that the current inability to pay will extend for a significant portion of the repayment period of the loan.") (emphasis added).

Hixson cannot demonstrate that he would be unable to maintain a minimal standard of living if he remains obligated to repay the full amount of the Consolidation Loan. Hixson concedes that he is able to meet a minimal standard of living in his present circumstances.[11] (Stip. 3 ¶ 12.) As the Parties stipulated, Hixson makes over $58,000 per year, which amounts to approximately $3,255 per month after taxes. Hixson's total monthly expenses amount to $1,983, resulting in disposable income of at least $1,272 per month, from which he could make the $808 monthly payments that would be required of him were he to pay off the *entire* Consolidation Loan under the Income Contingent Plan. Hixson would still be left with $464 in income at the end of each month. Given that repayment of the entire amount of the Consolidation Loan under the Income Contingent Plan would result in Hixson being able to maintain a minimal standard of living, and because repayment of the portion of the Consolidation Loan corresponding to Suokko's education would still allow Hixson to maintain a minimal standard of 22*22 living, the Court holds that the Plaintiff has failed to meet the first prong of the *Brunner* test.

(2) Persistence of Condition

Since the Court has found that Hixson is able to maintain a minimal standard of living even if required to pay the *entire* amount of the Consolidation Loan, it is unnecessary for the Court to inquire any further. "If one of the requirements of the Brunner test is not met, the bankruptcy court's inquiry must end there, with a finding of no dischargeability." *In re Faish,* 72 F.3d at 306. *See also* *In re Wells,* 380 B.R. at 661(noting that because the debtor was unable to satisfy one prong of the *Brunner* test, it was unnecessary for the Court to analyze the remaining prong).

Had an examination of Hixson's financial condition under the first prong of *Brunner*revealed that it was unclear whether Hixson could meet a minimal standard of living if required to repay the Consolidation Loan, the Court would have considered the second prong of the *Brunner* test. *See* *In re Wetzel,* 213 B.R. 220, 226 (Bankr.N.D.N.Y.1996). The second prong "requires that the Debtor prove more than his present inability to pay his student loan obligations. He must also establish that his current financial hardship is likely to be long-term." *In re Wells,* 380 B.R. at 659. The Court would consider whether "unique" and "exceptional" circumstances beyond the reasonable control of the Debtor prevent him from obtaining future employment and affect his ability to repay the debt. *Id.* at 659-60. However, where, as here, there is no doubt that the Debtor is able to afford a minimal standard of living, *see* Stip. 3 ¶¶ 12, an analysis under the second prong of the *Brunner* would add nothing to the Court's consideration of the Debtor's financial hardship.

(3) Good Faith

The Court will nevertheless address the last prong of the *Brunner* test for the sake of fullness. The third prong requires the Debtor to show he has made a good faith effort to repay the loan. *In re Brunner,* 831 F.2d at 396. "[A] *good faith* attempt at full repayment [is] `measured by [the Debtor's] efforts to obtain employment, maximize income and minimize expenses[.]'" *In re Stein,* 218 B.R. at 288 (emphasis in original) (citation omitted). The Debtor must exert reasonable efforts to insure repayment. *Id.*(citing *Brunner,* 831 F.2d at 397).

The Parties stipulated that Hixson made eleven voluntary payments on the Consolidation Loan from June 1999 to December 2000 and stopped making voluntary payments after December 2000. (Stip. 3 ¶ 13.) The Parties also stipulated that from October 14, 2004 through November 3, 2005, the DOE garnished Hixson's wages in bi-weekly payments. (*Id.*)

Hixson argues that he has satisfied the third prong of *Brunner* because he had allowed his wages to be garnished and had thus entered into an income contingent plan with the DOE. However, the DOE argues that Hixson's failure to make voluntary payments on the Consolidation Loan at a time when he was financially capable of doing so negates a finding of good faith. Further, the DOE emphasizes that wage garnishments cannot be characterized as a voluntary effort by the Plaintiff to enter into a repayment program.

While the Court recognizes that Hixson previously made eleven voluntary payments on the Consolidation Loan, which are an indication of good faith, Hixson subsequently failed to make further voluntary payments. Where a debtor has had the opportunity to repay an amount, 23*23 but did not; where "[n]o factors beyond [the] [d]ebtor's reasonable control precluding repayment have been suggested[;]" and where the debtor simply ignores his obligation, such conduct does not satisfy the third prong of the *Brunner* test. *Lehman v. N.Y. Higher Educ. Servs. Corp. (In re Lehman),* 226 B.R. 805, 809 (Bankr. D.Vt.1998). While Hixson argues that allowing his wages to be garnished is an indication of good faith, the nature of wage garnishment is contrary to the concept of voluntary payment. *See* 34 C.F.R. § 668.35(b)(2)(ii) ("Voluntary payments are those payments made directly by the borrower, and do not include payments obtained by Federal offset, garnishment, or income or asset execution."). Since Hixson failed to make voluntary payments after his initial eleven payments even when he had the opportunity to do so, and because Hixson did not present circumstances beyond his reasonable control that precluded repayment, the Court concludes that Hixson has failed to meet the good faith requirement of *Brunner.*

Failure to Pursue Collection against a Co-Obligor

Hixson posits that since this Court is a court of equity, the DOE has a reciprocal duty to act in good faith, which duty the DOE violated in pursuing collection solely against the Debtor despite the DOE's knowledge of the divorce of the Spouses, and despite its knowledge that Suokko was employed.

Although the DOE admits it has not pursued collection payments from Suokko, *see* Stip. 3 ¶ 14, this alone does not establish bad faith on the part of the DOE. The Spouses are jointly and severally liable for the entire amount of the debt under the Consolidation Loan; one Spouse may be required to pay the entire amount due regardless of whether the other Spouse is able or offers to pay. (Stip. 2 ¶ 5.) It is a fundamental tenant of joint and several liability that the DOE may bring a claim for payment against either of the obligors. *See, e.g., U.S. v. Rigas,* 490 F.3d 208, 223 n. 19 (2d Cir.2007) ("[A] bank has the right to collect from either co-borrower on a loan that provides for joint and several liability if the loan is overdue. ..."). To the extent Hixson pays more than his share of the loan, he may bring a claim for indemnity under state law against Suokko. *See Univ. Reinsur. Co. Ltd. v. St. Paul Fire and Marine Ins. Co.,* 2001 WL 585638, at *5 (S.D.N.Y.2001) (finding that an absent co-obligor remains liable for contribution to the other co-obligor who pays the judgment by suit) (citing *Greenleaf v. Safeway Trails, Inc.,* 140 F.2d 889, 890 (2d Cir.1994)). The pursuit of payment from one obligor over another is not an indication of bad faith on the part of the DOE.

Further, even if Hixson had established that the DOE acted in bad faith, such a finding would have no impact on this Court's analysis under the *Brunner* test.[12] The Court's consideration of the dischargeability of the Consolidation Loan turns on whether the loan at issue is owed by the Plaintiff, which it is, and whether the Plaintiff can repay the loan without suffering undue hardship, which he can.

In sum, the *Brunner* test applies in the same manner to each of the obligors under a consolidation loan. The *Brunner* test does not take into consideration the factors concerning the circumstances under which any of the loans were subsequently consolidated. The focus of the *Brunner* test is upon the facts and circumstances relevant 24*24 to the consequences of the repayment of the debt at issue and the good faith of the Debtor regarding the history of his efforts to pay.

V. Conclusion

Since the Debtor has failed to satisfy the three elements of the *Brunner* test, he cannot show undue hardship and his student loans are not subject to discharge. For the foregoing reasons, the Plaintiff's request to except the portion of his debt related to his wife from discharge under section 523(a)(8) of the Bankruptcy Code on the basis of undue hardship should be DENIED and the Defendant's motion for summary judgment should be GRANTED.

Counsel for the DOE is to settle an order consistent with this opinion.

[1] Section 523(a) provides, in relevant part:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

[(1) through (7) omitted]

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual[.]

11 U.S.C. § 523(a)(8) (Westlaw 2011) (effective April 1, 2007 to March 31, 2010).

[2] *Brunner v. N.Y.S. Higher Educ. Servs.,* 831 F.2d 395, 396 (2d Cir.1987).

[3] The Adversary Proceeding Cover Sheet and Verified Complaint were initially docketed under the chapter 7 case (the "Case") on March 13, 2006. (ECF Nos. 4, 5.) Notations were made on the docket indicating that the two documents should have been filed on the docket of the Adversary Proceeding. The Court has not discerned any difference in content between the Verified Complaint filed under the Case and the Verified Complaint filed under the Adversary Proceeding upon examination of the contents of both complaints. Thus, it is unclear why the DOE considered the complaint filed by the Debtor as an amended complaint.

[4] The Court notes that during the pendency of these motions, neither counsel for the DOE nor counsel for the Debtor called to the Court's attention the fact that the motions remained pending.

[5] The Court assumes the parties wrote this statement in the context of Hixson's ability to pay back the Consolidated Loan while maintaining a minimal standard of living. However, it remains unclear under which of the two repayment options the parties refer to in the Stipulation when discussing Hixson's "present circumstances." Prior to filing, Hixson had been making payments through a garnishment of his wages in bi-weekly amounts ranging from $221.55 to $584.70 (approximately $443.10 to $1,169.30 per month). (Stip. 3 ¶ 13.) The Standard Repayment Plan would require payments in the amount of $2,099.45 each month, while the Income Contingent Plan would require $808.35 each month. (*Id.* at 4 ¶ 16.) Since the Income Contingent Plan would require payments that approximate what Hixson had previously been paying, the Court believes the referenced paragraphs of the Stipulation refer to the Debtor's standard of living under the Income Contingent Plan.

[6] In maintaining that he never "rightfully owed" the debt, Hixson argues that it is not fair to hold him accountable for the debt of his ex-wife; however, he does not seem to contend, nor are there any facts to support an assertion that, as a legal matter he is not liable under the Note. To the extent it could be argued that Hixson actually challenges his obligation under the Consolidation Loan, the Court finds that in signing as co-obligor for the Consolidation Loan, Hixson became jointly and severally liable for the entire amount of the debt under the Consolidation Loan without regard to the amount of his individual loan obligation.

[7] 20 U.S.C. § 1078-3(a)(3)(C)(i) was effective from October 1, 1998 to February 7, 2002, and covers 1999, the year in which Hixson and Suokko obtained the Consolidation Loan.

[8] The law regarding whether a court may grant a partial discharge of student loans is unsettled. While "not all courts have agreed to consider a partial discharge of a student loan obligation ... other courts have found authority pursuant to Code § 105(a) to allow a partial discharge of student loans provided that the debtor is able to establish undue hardship as to that portion of the debt sought to be discharged." *In re Wells,* 380 B.R. at 662-63 (citations omitted) (internal quotations omitted). *See alsoIn re Pincus,* 280 B.R. 303, 311 (Bankr.S.D.N.Y.2002) ("In applying the *Brunner* test, the question arises whether a court must aggregate a debtor's student loans and determine their dischargeability as a whole, or whether a court's analysis may be conducted on a loan-by-loan basis. ... A third possibility arises as to whether a court may partially discharge a single student loan obligation on the theory that the debtor can repay a portion of it without undue hardship."). Since the Court finds the Debtor is able to sustain a minimal standard of living while repaying the entire loan, the Court need not consider whether a partial discharge would be appropriate.

[9] The Debtor argues that the Consolidation Loan "was available for only [two] years before the program was terminated due to concerns that it could not be split in divorce." (Pl.'s Mem. 1.) However, even if the Court accepts this assertion as accurate, the fact that the Consolidation Loan was "short-lived" does not impact the Court's reasoning. The broad language of the statute, which includes both student-obligors and non-student-obligors, as well as the Congressional intent to prevent abuse of the bankruptcy process and to "preserve the financial integrity of the loan system" *In re Wells,* 380 B.R. at 659, lead the Court to conclude that in order for the Debtor to except the portion of the Consolidation Loan at issue from discharge, the Debtor must demonstrate undue hardship under the*Brunner* test.

[10] This Court's approach in *In re Thoms,* 257 B.R. 144, 149 (Bankr.S.D.N.Y.2001) was not consistent with the court's analysis in *In re Harris.* Upon further reflection, the Court finds the *Harris* approach to be more appropriate. In determining a debtor's current ability to repay a loan, a court should consider in the first prong known future changes that may impact the debtor's future ability to pay.

[11] As discussed, *supra,* the Court believes the Stipulation refers to the Debtor's standard of living under the Income Contingent Plan. Even if the parties were referring to the Standard Repayment Plan, however, the Court could still consider whether Hixson could make the minimum payments under the Income Contingent Plan. *See, e.g., In re Thoms,* 257 B.R. at 149 (finding although debtor could not afford to make monthly payments under the loan's current repayment terms, debtor still failed to meet the first prong of the *Brunner* test because there were "many options available to the Debtor to attempt to restructure the debt ... [including] income contingent repayment plans.").

[12] It appears to the Court that if bad faith were found, such a finding would not be part of the "undue hardship" analysis. However, a debtor would not be precluded from pursuing other forms of relief based upon such conduct.

Appendix C: Special Issues in Student Loan Bankruptcy

Previous "Mistakes" or Choices

People often lose touch with the reality of their debts and act in an "irresponsible" way about them for some time. When this happens regarding student loans, it can be a major problem when it comes to attempting to discharge the loans in bankruptcy because the courts have often taken a highly moralistic and even vengeful position about past decisions. But there is some hope – it appears that some courts are becoming more present and future oriented, and you should work with that.

As we have shown, most jurisdictions apply the "*Brunner*" test. The *Brunner* court looked at the word "undue" and read a sort of "moral" component into the issue, asking: is the person facing difficulties because of things that he or she did? Choices willingly made? Or is it the result of things "beyond his control?" We believe this test did make some sense in the context it first came up in: the *Brunner* plaintiff had made some choices that strongly suggested she was either lying to the court or trying to scam the system at the time of the case. In any event, her attempts to pay her student loans had simply not been serious. The court very reasonably looked at the facts of her case to see if she had shown good faith and concluded that she had not.

Following *Brunner*, courts have found that good faith requires minimizing expenses and maximizing income, making reasonable efforts to find a job – outside the field of study if necessary – making payments when possible, and other similar things. Unfortunately, this good faith test is highly subjective. Courts applying *Brunner* have found bad faith in everything from having children to working in a field that did not pay very much, from subscribing to cable television or having a cell phone to not signing up for the ICRP regardless of whether the plan would require any payment at all at any time in the foreseeable future. In some other cases, on the other hand, all these things have been forgiven.

In reality, the good faith test has often been a simple test of whether the judge writing the opinion likes you and approves of your lifestyle choices, sometimes reaching far back into your past.

In many cases, that *remains* the fact. In *Buckland*, for example, a 2010 case, the parents of a child suffering from cancer were showing bad faith, in the view of the court, when they spent time taking care of their daughter or focused their job search in the area where they had their work experience and the best chance of obtaining a job that could pay the loans and medical bills. As far as we know, the moron responsible for this opinion is still in position to make a mockery of the law.

But there has gradually been a shift away from quite so much moralization. The courts have stopped looking so far into the past in search of things to blame and have begun to take a more "prospective" view of matters. Looking forward, in other words to determine whether the search for discharge was "legitimate" or cause, for example, by an actual bad faith to game the system. A good example of a court applying the test in this way is, ironically, Polleys, the very decision that *Buckland* flaunted so disgustingly. In Polleys, the court cautioned lower courts to focus less on the way the borrower had arrived in the position he or she was in, and more on whether the effort to obtain relief was legitimate.

In In re Bene noted (below in this appendix), the court applied an unusual analysis to Brunner. Stating that Brunner had unfortunately been taken as "biblical" by some, the judge engaged in some "exegesis," which is the process or reinterpreting and applying Brunner to more contemporary times. The court looked at the facts before it in *Bene* and concluded that they were different enough from *Brunner* itself so that *Brunner* did not control its decision. Then, the court engaged in its "exegesis" and concluded that the Brunner court *would have* looked at things differently under the facts of Bene and supported the ruling reached in *Bene*. In other words, the Bene court purported to distinguish ***and*** to follow *Brunner*.

Aside from the unorthodox description of what the court did, however, it was actually a very reasonable approach. The *Bene* court contrasted its plaintiff's advanced years, low education and 25 years of attempts to repay (and so forth) with *Brunner's* youth, high education, and no attempt to pay, on the way towards finding that the *Bene* plaintiff had shown good faith. The critical facts in *Bene* for this analysis was that Bene had withdrawn from school and helped her ailing parents instead of completing her degree and, as part of a Medicare "spend-down" had taken $25,000 from her parents and kept it to spend on them (rather than, as the debt collectors contended she should have done, give it to them). These were choices that lowered Bene's income and ability to pay the student loans, and the debt collectors argued that the choices she made showed "bad faith" under Brunner.

The court rejected that argument, stating that:

> This Court holds that the *Brunner* test looks to the present and the future, not to the distant past. The test requires that the Court determine whether present circumstances will continue for a time into the future for reasons outside a debtor's control. A moral choice that some debtor made 24 or more years ago to forego opportunities she then had to improve herself, and thus to optimize her potential to earn enough money to repay her student loan debt, is not relevant to a *Brunner* analysis.
>
> This Court also holds that the same is true as to a moral decision to devote a lump sum of money to the care of a debtor's parents two decades ago, when that money would have paid-off the pre-existing loan debt.
>
> ***In re Bene, 474 B.R. 56, 61 (Bankr. W.D.N.Y. 2012)***

Later in the decision, the court elaborated in language that both makes great sense and should bring hope to people who have changed their lives:

> What this writer failed to emphasize is the difference between *seeking to discharge the student loan debt in bankruptcy* or not so choosing. To be more specific, there are *three* "choices" involved. The first is the choice to become poor or to remain poor *after the borrowing.* The second is choosing to *seek discharge* of the student loans in *bankruptcy.* The third is how one chooses to live *after filing* for bankruptcy relief. The last presumes "options."
>
> The first choice, if it temporally came before any consideration of bankruptcy, is forgiven in bankruptcy, especially if made twenty-four years before asking for discharge of student borrowing that was incurred before the choice to be poor was made. *One can hope for a future that will permit both the fulfillment of a noble choice and repayment of student loan debt.*
>
> If one eventually suffers the need to seek relief from the bankruptcy court (the second choice), the third choice is the only important one. What shall he or she do in light of what the future may hold, given the discharge of other debt and the existence of student loan debt?

Id. at 68.

Past mistakes are forgiven in bankruptcy – but making a choice not to be able to afford to repay student loans is not available to students seeking discharge of their student loan debt. Making the choice not to pay means facing the consequences of that choice.

There are ***two things that anyone seeking to apply Bene to his or her situation must bear in mind***. ***First***, the choices that Bene had made in the past were made long before the issue of bankruptcy and discharge came into question, thus there was no question of the Bene plaintiff trying to sneak something over on the court or the lenders. ***Second***, and somewhat harder to evaluate for importance, it was clear that the *Bene* court approved of the choices *Bene* had made. It did talk about courts "forgiving" past mistakes, but it did not regard the choices *Bene* had made as mistakes. Had Bene's choices been criminal or even less sympathetic, it is hard to know how the court would have ruled.

Anyone seeking a result similar to *Bene* would be well-advised to *try to position all the larger decisions in question as much the same way as possible*. For example, if you went for years without paying student loans while buying more than the most necessary vehicles or living at a higher than court-approved lifestyle, you should make every effort to justify every expense as child-care or child safety (or some other praiseworthy reason) oriented. Having the court like you remains of great importance, and this is one reason a skilled and experienced lawyer might make a crucial difference.

Partial Discharge Availability

According to the bankruptcy statute, discharge of student loans is not permitted unless the debtor can show that denying discharge would result in "undue hardship." In conjunction with the *Brunner* test, the courts have used this provision to wreak devastation on bankruptcies for many years. One issue that has arisen is a sort of double-edged sword: is it possible to discharge student loans partially – in order to bring them down to a level where they do not impose an undue hardship? The courts have, to an extent, disagreed with each other. *See* *Grigas v. Sallie Mae Servicing Corp. (In re Grigas),* 252 B.R. 866 (Bankr.D.N.H.2000)(for a catalog of cases on both sides of the issue).

We consider this a double-edged sword, because the courts that hold that discharge is an "all or nothing" affair often use the *Brunner* test to leave all the debt – far beyond any reasonable ability to pay – undischarged. On the other hand, what exactly is reducing the debt to a point where it does not result in an undue burden, and how in the world does it comport with the bankruptcy code's requirement of a "fresh start?" When a court reduces a student loan payment to an amount that does not constitute an "undue hardship," it is choosing to saddle a person with loan payments for up to twenty-five years that absorb a very significant amount of the bankrupt's income.

A central purpose of bankruptcy is to allow debtors to "make peace" with their creditors and move into the future unhampered by their previous mistakes. This is quite routine and nonjudgmentally granted in most bankruptcies. Crimes, domestic support payments, taxes and student loans receive different treatment, however. As must be obvious from our review of cases, even where student loans have been found to be unduly burdensome, the courts have usually adjusted the amount of student loans remaining after discharge to result in a long life of near poverty or below for those saddled with the loans. This is simply NOT the “fresh start” supposed to be provided by the bankruptcy laws. It is almost the reverse – the almost unending perpetuation of unpayable debt.

One court that refused to permit this was the Ninth Circuit in, In re Taylor 223 B.R. 747 (1998). The court there found that if payment of the loan would result in undue hardship, the whole loan should be discharged. The Ninth Circuit has reversed itself in *In re Saxman, 325 F. 3d 1168 (9th Cir. 2003)* and Hedlund v. Educational Resources 718 F.3d 848 (9th Cir. 2013) and now does permit partial discharge. Partial discharge is also permitted by 6th Circuit, In re Hornsby, and “accommodated” by In re Lamanna, 285 B.R. 347 (Bankr. D. R.I. 2002). In *Lamanna*, the court did not reduce any particular loan, but it applied the undue hardship test to each of the loans, resulting in some of them being discharged, while others were not.

Because bankruptcy is social legislation designed to benefit the people it applies to, it should be read liberally to accomplish its purposes, and its prime purpose is to allow a fresh start. The student loan provision, designed to limit the benefits of bankruptcy, should accordingly be read narrowly. Thus, under the *Brunner* test, which is loaded with all sorts of “character test” tests, if a party can show that the loan creates an undue burden, it should be discharged in its totality to permit a fresh start. Reading the student loan exception broadly and permitting partial discharge, results in the courts reducing the loan down to the point where they believe it becomes “undue,” but this simply means to deny a fresh start completely to people who have, under the statute, demonstrated a right to it.

Even prior to its ruling in *Saxman*, the 9th Circuit had noted that its opinion in *Taylor* had been criticized for, among other things, favoring students with larger loans (and, by implication, those who had been less frugal during their student days). We agree that that criticism could be said to apply, and we disagree that it should make any difference – in theory. But it does.

Students take on student loans, for the most part, because they hope to obtain larger salaries eventually – or because they are hoodwinked by the schools into taking them. Thus, a larger student loan balance is NOT indicative of recklessness or moral wrongness, as implied by the criticism – these are people who have been encouraged and helped to dig themselves deeper holes. The fact that they end up in deeper holes is not an argument against help in bankruptcy. It is a fact that a larger loan payment is harder to pay and tends more to be unduly burdensome, but help should not be withheld on the grounds that it is needed more.

A better way to deal with the issue is to build some sort of rationality test into the student loan program itself. If schools feel like their programs are beneficial – and specifically beneficial enough to the students to whom they are offering admission – then they should be willing to bear some of the risk that it might not be so. Most student loan debtors emphatically do not want to declare bankruptcy - that basis of the bankruptcy exception was a fraud – and schools with beneficial programs would face no significant run on their resources. To the extent they did, however, they could, as the “repeat players” in the game, devise policies that could spread the risk or reduce it. Leaving individual students by the millions to deal with gigantic and unpayable loans is unconscionable. It is also unworkable – the students will reject it, most likely at a socially unacceptable price.

Tithing

Suppose you are a religious believer and think that, as a part of that, you should regularly contribute to your church? Are you entitled to keep doing that through a bankruptcy proceeding? Or does the money you tithe count as part of your assets against your bankruptcy plan?

Surprisingly, the answer to that in general is clear. Congress decided the question in 11 U.S.C. Section 1325(b)(2)(A), called the "Religious Liberty and Charitable Donation Protection Act of 1997." According to that act, donations to a "qualified religious organization" up to 15% of the gross income of a debtor may not be included in the debtor's "disposable" income for bankruptcy.

At least two courts have held that that section made no change to Sec. 523(a)(8). *See, ECMC v. McLeroy, 250 B.R. 872, 880 (N.D. Tex. 2000) and Ritchie v. Northwest Educ. Loan Ass'n., 254 B.R. 913, 919-21 (Bankr. D. Idaho 2000)*. Other courts, on the other other hand, have concluded that the disposable income standard in Sec. 1325(b)(2) should be used for the "minimal living standard" analysis under Sec. 523(a)(8). *See, Robinson v. ISAC, 2002 WL 32001246, *3 (Bankr. C.D.Ill. Oct. 22, 2002)*. The *Durrani* court (above) found that a bankruptcy judge "should not override a debtor's commitment to tithing" and did not include the money she gave to her church in its analysis.

Our belief is that, until the provision's interpretation is a little clearer, it isn't clear what will happen, and that means that the decisions will likely be made based upon the individual judges' beliefs – and on whether the bankruptcy judge likes you.

Disability and the FFELP

The student loan programs have programs to deal with people with disabilities. In In re Cagle, 462 B.R. 829 (Bankr. D. Kansas 2011), the plaintiff claimed he had asthmatic bronchitis, severe sciatica and paresthesia of the legs, cervical osteoarthritis with bilateral radiculopathy, chronic fatigue syndrome/fibromyalgia, and renal colic from gout. The plaintiff had $94,000 of student loans and sought a bankruptcy discharge under 523(a)(8) without having first sought a disability discharge first. The lender moved to dismiss the bankruptcy for failure to "exhaust" administrative remedies.

As the court wrote:

> A FFELP discharge is an administrative matter, handled by the Department of Education (DOE), and is completely separate and distinct from a bankruptcy discharge based on § 523(a)(8)'s undue hardship standard. A student debtor could be entitled to a § 523(a)(8) discharge without qualifying for a 34 C.F.R. § 682.402(c) discharge and vice-versa. FFELP and its implementing regulations explicitly provide for bankruptcy as an alternative ground for a student loan debt discharge. Debtors who choose to pursue a FFELP discharge do not have a private right of action under 20 U.S.C. § 1087 in bankruptcy, but there is no prohibition on seeking a § 523(a)(8) discharge.
>
> The FFELP discharge applicable in this case requires the DOE to find the student loan debtor is totally and permanently disabled.[9] A student debtor's compliance with this regulation and his

> entitlement to an administrative discharge does not equate with the debtor's right to receive an educational loan discharge in bankruptcy.
>
> *Cagle*, 462 B.R. at 432

The court continued with its analysis – in a generic way, because this was at the motion to dismiss stage:

> A debtor's disability and his attempt (or lack thereof) to obtain an administrative discharge ***may be considered*** in an undue hardship analysis under § 523(a)(8). The good faith requirement is sufficiently malleable to cover a wide array of conditions. For example, the bankruptcy court may determine the debtor lacks a good faith attempt to repay the loan when administrative remedies are available to him but are not pursued. Likewise, where a debtor requests an administrative discharge before filing bankruptcy, the court may require the debtor to complete, or exhaust, the administrative process before making a § 523(a)(8) determination. On the other hand, a student loan debtor is free to resort to a discharge in bankruptcy under § 523(a)(8) at any time.

The court in the Cagle case actually just denied the motion, holding that the two causes of action were legally independent. We have not found any other cases discussing the bankruptcy and disability programs, but we believe that the analysis of the ICRP and disability will be similar – the question will be at what point, exactly, is the lender able to "finesse" the bankruptcy process by offering a facially forgiving plan that keeps the debt alive? *See, In re Bene*, 474 B.R. 56, 57 (2012). It is unclear where this point comes, and in case of the disability program, we are not sure what the differences would be between the two, as a finding of permanent disability will result in a discharge of the debt – albeit with tax consequences, perhaps.

Necessity of Expert Testimony and Evidence

In determining to what extent a person's medical condition may, under the Brunner test, have long-range effects that show whatever degree of permanence required, the courts have sometimes considered what type of evidence would be necessary to explain the condition. Because judges are rarely medical experts themselves, they often cannot actually interpret evidence of medical conditions to determine their permanence. So some courts require expert medical testimony. The problem with this, however, is that such testimony is expensive. People with severe medical conditions who are also in bankruptcy are the least able to pay for expensive medical testimony, and thus it happens that those most in need of student loan discharge are, in some jurisdictions, the least likely to get it.

For a thorough and thoughtful analysis of this issue and an appropriate but somewhat odd decision in itself, see *In re Mosley, 330 BR 832, 43 - Bankr. Court, ND Georgia 2005* (attached in appendix). The court in Mosley noted that plaintiff had been unable to enter any medical evidence into evidence because of the aggressive objections of the lender but held that her testimony, combined with her efforts to present more tangible reports and other medical evidence, was enough to satisfy her burden under the second test of Brunner. We think it was a fair decision, and it includes many cases that discuss the issues and reach similar, fair results, but what makes it odd is that, in the final analysis, the court sustained the objections to the evidence and was not legally permitted to consider the rejected exhibits. Considering the fact that evidence was rejected was probably an error in law. We include the case for its discussion and the cases cited in its discussion, primarily, then – and as an example of the right decision only secondarily.

The Ford Program, ICRP (Income-Contingent Repayment Program) and Taxes

There is a program that sounds very helpful, and in some situations it certainly could be. It is the Income-Contingent Repayment Program, 34 CFR Sec. 685.100 et seq. This program basically provides that student loan payments can be repaid as a given percentage of the amount of income the borrower earns above the poverty line. If the borrower never makes enough to pay off the loan, then the loan is "forgiven" at the end of 25 years.

Most courts examining the ICRP have found that when the loan is forgiven at the end of the 25 years, the cancelation of debt is a taxable event. That is, the government regards the cancellation of debt as earning income. Since interest continues to accrue throughout the life of the repayment period, the amount cancelled can be far more than was ever lent in the first place. This money is taxable as income and, under the bankruptcy law, is not dischargeable in bankruptcy. Thus, as many courts have held, the ICRP substitutes one large, nondischargeable debt for another one – in the far distant future. See, e.g., In re Bronsdon, 435 B.R. 791, 801-2 (B.A.P. 1st Cir. 2010), citing several cases. But see

For a small group of people, this "Ford Program" could be a reasonable proposition. Unfortunately, it has been used by the lenders in a devilish way – to hold borrowers, as much as possible, to loans they could never pay off, and then saddle them with enormous tax burdens late in life.

Indeed, many commentators have stated that the Ford Program "implied a repeal" of the bankruptcy provision pertaining to student loans by making it possible to have zero-dollar "repayments" for up to 25 years. Paying nothing could never be unduly burdensome, and so, as the lenders' mouthpieces have argued, failing to contemplate and agree to such a program must always, under Brunner, be "bad faith."

In brief, the way the ICRP program works, is that specified lenders must be willing to make payment schedules that take into account the borrower's financial means for making payments. As we have said, it is based upon a fraction of amount of money earned over the poverty level for the borrower and his or her dependents. The number could be as low as zero dollars – for any amount of time – or could go up for so long as necessary to repay the loan.

The program would work well in a few situations. First, if the borrower had settled into a life – not requiring credit to any extent and being exceptionally stable – where he or she received very little money for an entire career before relapsing into the beneficial care of some institution or another, the ICRP might work. That is, it would be fine for a life-long monk or nun, or perhaps some similar situation (a permanent Peace Corp volunteer, for example) that was more living arrangement than employment. Such people would never have anything and would likewise be immune to the government's garnishment of Social Security benefits for the unpaid taxes caused by the loan's eventual discharge.

The other group benefited by the Ford Program are those who are facing some sort of temporary earning hardship but who, before very long, will return to full income potential – and whose education has fitted them for high-paying jobs. In other words, the Ford Program is beneficial for a vanishingly small proportion of the people who could qualify for it. The true purpose and effect of the program is to chain students to their loans for ever longer periods of time.

The reason the program is actually beneficial in so small a number of cases is that it is not a deferment that results in interest being suspended. For the whole time you are in the program, the loan is churning out liability at the same rate it ever did. If your loan is substantial, then the program stands ready to suck up every cent you ever make if you ever do; with luck, you can get a job relatively early that enables you to pay the thing off long before retirement so that you can get on with life. Hey – it can happen. It just isn't really the reason for the program.

Luckily, the courts have resisted completely giving in to the Ford program. See, e.g., In re Bronsdon, 435 B.R. 791 (B.A.P. 1st Cir. 2010), which we discussed above. Or consider *In re Bene* (above), which does at least reject the ICRP's plan to add another 25 years to the debtor's ***already almost 25 years of debt servitude***. In that case, after 25 years of occasional payments (the court held that they were all the debtor could ever afford, the debtor's student loan had gone from under $17,000 (borrowed) to over $55,000 (owed). The Bene court quoted Collier on Bankruptcy:

> Collier states "Courts must ... be careful not to treat the enactment of the statute authorizing the United States Department of Education to accept an income-contingent repayment plan as an implied repeal of § 523(a)(8) of the Bankruptcy Code.... At bottom, the Bankruptcy Code requires Bankruptcy Courts to decide how much personal sacrifice society expects from individuals who accepted the benefits of guaranteed student loans but who have not obtained the financial rewards they had hoped to receive as a result of their educational expenditures." Collier on Bankruptcy, 15th Edition ¶ § 523.14[2].

Thank goodness, in the case of *Bene*, the court decided enough was enough – but as we have already pointed out, it did this because it approved of her, and not because the test as it conceived it, required that holding. Many other decisions we have quoted above have held similarly – but just as many or even more have found that refusal to accept the ICRP plan's invitation to 25 more years of debt slavery was an act of "bad faith" under *Brunner* that disqualified the debtor from discharge. See, In re Gesualdi, *505 B.R. 330, 345 (Bankr. S.D. Fla. 2013)(refusal to accept ICRP was evidence of bad faith, rejecting argument of tax liability).*

Credit Damage Caused by Unpaid Loan Balance

Only a few courts have recognized the continuing burden that a large loan balance has on one's credit report, but this is no negligible thing, actually, and a student loan balance holds you back. In the first place, when creditors contemplate giving credit, and consequently in the analysis of one's credit score, a large balance due means a heavier "debt load." This makes it far less likely that credit will extended to you. Thus a student loan – for example through the ICRP program – can prevent you from getting business loans for decades.

Secondly, landlords typically look at credit records before accepting tenants. Thus there is a largely unseen hit caused by the loans – they raise the price of everything else, and they can make moving to a new place difficult or impossible. Unlike the courts in most cases, the court in Durrani (above) considered this issue. It reasoned that the ICRP, which would have required no payments from the plaintiff, but would have kept the loan on the books for another 25 years, would have needlessly been harming the debtor's credit report. The court found this was a factor that kept Ms. Durrani from moving to a safer location as the neighborhood around her deteriorated. Thus the court regarded Durrani's reduced safety as an "undue harm."

Schools and School Districts as "Undue Harm"

We would suggest that school quality could be a similar issue – Durrani's concern was her personal, physical, safety, but being trapped in a bad school district is harmful to the debtor's children, and courts are required to consider undue harm to the debtor's dependents as well as to the debtor himself or herself. Children are always viewed more favorably by the court because of their undeniable innocence.

The Emotional Burden of Student Loans

The Durrani court also considered the emotional distress caused by having a large, unpaid and unpayable student loan hanging over you. Only a few courts have considered this issue to be important. See, e.g., Fahrer v. Sallie Mae Servicing Corp., 308 B.R. 27 (Bankr. W.D. Mo. 2004) and Herrmann v. U.S. Dept. of Educ, 2000 WL 33961388 (Bankr. C.D. Ill, Feb. 7, 2000). In these cases a few courts have noted that keeping student loans alive – although mostly unpaid and accruing interest – for periods exceeding thirty years exerts a terrible emotional toll on the former student.