No.

IN THE

Supreme Court of the United States

EDUCATIONAL CREDIT MANAGEMENT CORPORATION,
PETITIONER

v.

LAURA SUSAN REYNOLDS; PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY; THE EDUCATION RESOURCE INSTITUTE; HEMAR INSURANCE CORPORATION OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Bankruptcy Code, student-loan debt is nondischargeable except in cases of "undue hardship." To determine undue hardship, nine circuits have adopted the *Brunner* test, which requires, as a threshold, an inability to repay the student-loan debt. The Eighth Circuit rejected this test and created a new standard that allows debtors who have the ability to repay to discharge their student-loan debts. Should this Court establish *Brunner* as the national standard for undue hardship?

RULE 29.6

Educational Credit Management Corporation (ECMC) is a private, nonprofit corporation organized under Minnesota law and headquartered in St. Paul. Its parent corporation is ECMC Group, Inc. a private nonprofit corporation organized under Delaware law. No publicly held company owns more than 10% of ECMC or ECMC Group's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ECMC respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Reynolds v. Pa. Higher Educ. Assistance Agency (In re Reynolds)*, 425 F.3d 526 (8th Cir. 2005), and is reproduced in the Appendix at App. 1a. The opinion of the United States District Court for the District of Minnesota, affirming the United States Bankruptcy Court for the District of Minnesota, is not reported, but is available at *Reynolds v. Pa. Higher Educ. Assistance Agency (In re Reynolds)*, 2004 WL 1745835 (D. Minn. 2004). It is reproduced in the Appendix at App. 28a. The decision of the Bankruptcy Court discharging Reynolds' student-loan debt is reported at *Reynolds v. Pa. Higher Educ. Assistance Agency (In re Reynolds)*, 303 B.R. 823 (Bankr. D. Minn. 2004), and is reproduced in the Appendix at App. 41a.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on October 10, 2005. The Eighth Circuit denied Petitioner's timely petition for rehearing en banc on January 26, 2006. *See* Appendix at 79a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

A. The Bankruptcy Clause of the United States Constitution, art. I, § 8, cl. 4, which empowers Congress to establish "uniform laws on the subject of Bankruptcies throughout the United States."

B. Section 523(a)(8)[1] of the Bankruptcy Code, which 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 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.

[1] All references to § 523(a)(8) are to the section as written before the changes made by the Bankruptcy Abuse Prevention and Consumer Act of 2005 (BAPCA), Pub. L. No. 109-8, tit. II, § 220, tit. XV, § 1501, 119 Stat. 59, 216 (2005) (effective 180 days after Apr. 20, 2005). The changes made by BAPCA did not substantively affect the undue-hardship provision of the Bankruptcy Code.

INTRODUCTION

For more than 40 years, the federal student-loan program has provided educational opportunities to Americans without regard to creditworthiness. To protect the financial integrity of the student-loan program and prevent abuse by debtors, Congress barred courts from discharging student loans in bankruptcy unless the debtor proved it would be an undue hardship to repay the student-loan debt. Nine circuits have held that proof of the debtor's inability to repay the debt is the minimum necessary for an undue-hardship discharge. But based on nonpecuniary considerations, the Eighth Circuit Court of Appeals affirmed the discharge of over $140,000 of student-loan debt owed by a debtor who was able to repay the debt. The Eighth Circuit's decision jeopardizes the integrity of the federal student-loan program and opens up the potential for abuse by student-loan debtors. It also creates a split between the Eighth Circuit and nine other circuits over what is the appropriate test is for determining an undue hardship under 11 U.S.C. § 523(a)(8).

STATEMENT

At the time of trial, Plaintiff-Debtor Laura Reynolds (Reynolds) was a physically healthy, 32-year-old married woman with no children. Despite having psychological problems that began in junior high school, Reynolds graduated cum laude from Claremount McKenna College in 1992 and from the University of Michigan Law School in 1995. She passed the Colorado bar exam on her first attempt. Although she never worked in any significant legal position, she held

various administrative positions over the years. She was never fired from any job for any reason.

In June 2000, Reynolds filed a Chapter 7 bankruptcy petition in federal court seeking an undue-hardship discharge of more than $140,000 in student-loan debt.[2] At trial, Reynolds argued that she was able and willing to pay $100 a month toward her student loan debt. The bankruptcy court disagreed that she had only $100 a month in disposable income stating that the "hard financial evidence, even that she proffered, does not bear out her conclusory protestation that she had no more than $100.00 per month in disposable household income." *Reynolds*, 303 B.R. at 838. In fact, even after adding some additional expenses for "emergencies" and a future car payment and rounding up "to account for the vagaries of everyday life," the court still determined that Reynolds had $700 a month in disposable income. *Id.* at 834. Nonetheless, the court discharged the entire amount owed because of the negative effect the court perceived the debt would have on Reynolds' mental health. *Id.* at 841.

The bankruptcy court recognized that the law generally denies discharges to debtors who are able to repay their student-loan debt but interpreted an earlier Eighth Circuit decision as leaving open the possibility that nonpecuniary factors could trump a debtor's ability to repay. *Id.* at 836. On appeal, the district court affirmed the bankruptcy court, also relying the Eighth Circuit's "less restrictive approach" to undue hardship determinations. *Reynolds*, 2004 WL 1745835 at *5.

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[2] The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2) and 28 U.S.C. § 1334(a).

On appeal to the Eighth Circuit, the appellant student-loan creditors argued that the threshold issue of undue hardship was "ability to repay" and that nonpecuniary factors could not justify discharging the student-loan debt of someone with an established ability to repay. In a 2-1 decision, the panel affirmed the discharge, with one judge specially concurring. The student-loan creditors petitioned for rehearing en banc, asking the court to either affirm that financial considerations are determinative under the totality-of-the-circumstances test or to adopt the *Brunner* test. The court denied rehearing by a 6-5 vote.

REASONS FOR GRANTING THE PETITION

A. The Eighth Circuit has created a 9–1 split among the circuits regarding undue-hardship determinations for the discharge of student-loan debt.

1. There can be just one legal standard for undue hardship.

Although many types of debts can be discharged in bankruptcy, Congress made it clear that student-loan debt is nondischargeable "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). Congress did not provide a specific test or define "undue hardship," but the use of the "adjective 'undue' indicates that Congress viewed garden-variety hardships [an] insufficient excuse for a discharge of student loans." *Brunner v. N.Y. State Higher Educ. Servs. Corp. (In re Brunner)*, 46 B.R. 752, 753 (S.D.N.Y. 1985); *see Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 399 (4th Cir. 2005); *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1087 (9th Cir. 2001). Because of the necessity for uniformity in bankruptcy laws throughout the United States,[3] there must be a single legal standard for undue hardship.

2. Two tests have emerged to determine whether debtors are entitled to discharge of their student loans as an undue hardship.

Nine circuit courts of appeal have adopted the three-prong *Brunner* test[4]—established nearly 20 years ago—under which the debtor must demonstrate:

(1) an inability to maintain, based on current income and expenses, a "minimal" standard of living if forced to repay the loans;

(2) additional circumstances showing that this state of affairs is likely to persist for a

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[3] *See* U.S. Const. art. I, § 8, cl. 4.

[4] *See Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393 (4th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382 (6th Cir. 2005); *Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004); *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003); *U.S. Dep't of Educ. v. Gerhardt* (*In re Gerhardt)*, 348 F.3d 89 (5th Cir. 2003); *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998); *Pa. Higher Assistance Found. v. Faish* (*In re Faish)*, 72 F.3d 298 (3d Cir. 1995); *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993); *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987). Only the First Circuit has not formally adopted a particular test for undue-hardship determinations.

significant portion of the repayment period of the student loans; and

(3) good-faith efforts to repay the loans.

See id. The inability to maintain a minimal standard of living, based on current income and expenses, if forced to repay the student loans is "the minimum necessary to establish 'undue hardship.'" *Brunner*, 831 F.2d at 396. The debtor bears the burden of proof on all three prongs. *Goulet v. Educ. Credit Mgmt. Corp.*, 284 F.3d 773, 777 (7th Cir. 2002). If the debtor fails to meet any prong, the court's analysis ends, and the student loans are not discharged. *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 327-28 (3d Cir. 2001).

The Eighth Circuit rejected the *Brunner* test three years ago. In *Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 322 F.3d 549 (8th Cir. 2003), the Eighth Circuit adopted the so-called totality-of-the-circumstances test to determine undue hardship under § 523(a)(8).[5] This test requires a bankruptcy court to consider:

[5] While the *Long* panel stated it was reaffirming the totality-of-the-circumstances test set forth in *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews)*, 661 F.2d 702, 704 (8th Cir. 1981), a plain reading of *Andrews* demonstrates that no particular test was established in that case. Relying on congressional intent and a couple of bankruptcy cases, the *Andrews* panel simply stated some general principles regarding the undue-hardship analysis. Significantly, these principles all focused on debtors' ability to repay their student-loan debt.

(1) the debtor's past, present, and reasonably reliable future financial resources;

(2) the debtor's and her dependents' reasonable, necessary living expenses; and

(3) any other relevant facts and circumstances surrounding each particular bankruptcy case.

See id. at 554. The Eighth Circuit summed up this test: "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." *Long*, 322 F.3d at 554-55.

Because each of tests appeared to consider the same factor-ability to pay-the legal standard was generally applied in a consistent manner.[6] So even though two tests for undue hardship now existed, it was not clear until this case arose that the Eighth Circuit had created a different standard.

[6] In *Rose v. Educ. Credit Mgmt. Corp. (In re Rose)*, 324 B.R. 709 (B.A.P. 8th Cir. 2005), the first case to be appealed after the *Long* decision, the bankruptcy appellate panel properly reversed the discharge of the student loan debt of a debtor who had the ability to repay her debt. This case was not appealed to the Eighth Circuit.

3. The Eighth Circuit created a different standard when it affirmed the discharge of a student-loan debt despite the debtor's ability to repay it.

The bankruptcy court in *Reynolds* recognized that when the Eighth Circuit adopted the totality-of-the-circumstances test in *Long*, it "clearly envision[ed] the simple dollar-and-cents circumstance of ability to pay as a crucial factor." *Reynolds*, 303 B.R. at 838. But the bankruptcy court believed there was an "unresolved tension" between this consideration and the Eighth Circuit's desire to have a "less restrictive approach" than the *Brunner* test affords. *Id.* at 836. Because of this perceived tension, the court believed it could discharge Reynolds' entire student-loan debt despite her ability to repay it because "[n]ondischargeability poses such negative consequences to the Debtor's mental health recovery, that they outweigh her current ability to make payment on at least a portion of her educational loan obligations." *Id.* at 841. The district court affirmed, stating that "subjugating Reynolds's severe mental illness to purely financial considerations undermines *Long's* adherence to a "less restrictive approach to the 'undue hardship' inquiry" as compared to the more rigid *Brunner* test." *Reynolds*, 2004 WL 1745835 at *5.

The Eighth Circuit affirmed the discharge despite Reynolds' ability to repay the debt now and in the future. The court spent some time discussing its mistaken belief that Reynolds would not have any future disposable income. But the bankruptcy court clearly found that she had and would have adequate disposable income in the future and that finding was not appealed. Reynolds herself never argued that

repayment in and of itself imposed an undue hardship. *Reynolds*, 303 B.R. at 838 (footnotes omitted).

The legal basis for the Eighth Circuit's affirmance became clear when the court rejected the Petitioner's and other creditors' arguments that Reynolds had additional household disposable income. As the court put it: "Because the bankruptcy court's holding was not ultimately based on financial details of whether Reynolds could afford monthly payments, we conclude that the resolution of these arguments would not affect our holding, and we therefore need not reach them." *Reynolds*, 425 F.3d at 534. By affirming that the legal basis for the bankruptcy court's decision was not Reynolds's inability to repay her student-loan debt and by refusing to address any factual financial arguments related to her ability to repay, the Eighth Circuit held that the ability to repay was not determinative for discharging a student-loan debt under the undue-hardship exception. It has nothing to do with the ability to pay. Judge Riley objected to this new standard in his dissent, where he stated, "In asking whether illness itself is an undue hardship, the majority changes this circuit's law—a change I find unwarranted in either law or policy." *See id.* at 537.

The Eighth Circuit solidified the new standard and confirmed its departure from the nine *Brunner* jurisdictions by rejecting the student-loan creditors' request that the whole court either reaffirm that the totality-of-the-circumstances test is based on the ability to pay or adopt the *Brunner* test. This new standard is different and significantly lower than the *Brunner* standard, which requires, as a threshold, the inability to repay.

4. Because Reynolds could repay her student-loan debt, she would not have met the Brunner test for undue hardship.

Reynolds would not have met even the first prong of the *Brunner* test, which requires that she prove she cannot maintain, based on current income and expenses, a minimal standard of living if forced to repay her loans. *See Brunner*, 831 F.2d at 396 (inability to repay the student loan debt is the "minimum necessary" to establish undue hardship). Under the bankruptcy court's own findings Reynolds had $700 a month in disposable income; this factual finding was not appealed. *Reynolds*, 303 B.R. at 834. This was more than sufficient to cover the complete payment of the student loan debts to the U.S. Department of Education (ED), ECMC and Pennsylvania Higher Education Assistance Agency (PHEAA), which was only $502.49. *See id.* at 835. In fact, she would have also had enough to pay HEMAR. *See id.* The total payment to ED, ECMC, PHEAA and HEMAR would have been $572.55 (HEMAR payment of $70.06). *See id.*

Moreover, because only actual *current* expenses are considered under the first prong of *Brunner*, the bankruptcy court's *speculative future* expenses of $197.50[7] and incorrect expense for auto insurance would not be considered under the first prong of the *Brunner* test. Thus, Reynolds would have had more than enough additional disposable income to also make the monthly

[7]The bankruptcy court added $100 for emergencies, $75 for future vehicle acquisition, and $22.50 to "account for the vagaries of everyday life." *Reynolds*, 303 B.R. at 834.

payment owed to The Educational Resources, Inc. Accordingly, Reynolds would have failed the first prong's threshold, and none of her student-loan debt would have been discharged in a *Brunner* jurisdiction.

Only one published case addresses the precise issue before this Court. In *In re N.M.*, 325 B.R. 507 (Bankr. W.D.N.Y. 2005), the bankruptcy court considered facts strikingly similar to Reynolds'. Plaintiff N.M. was a 43-year-old single attorney who worked in a development office and earned $28,000 a year because she could not handle the stress of private practice. *Id.* at 509. N.M. suffered from depression, with suicidal ideation, anxiety, and panic attacks, which had required hospitalization. *Id.* at 510.

The bankruptcy court applied the *Brunner* test and rejected N.M.'s argument that her "psychiatric health might be affected adversely" if she were compelled to repay her student loans. The court stated: "The debtor's mental health might well benefit from the avoidance of stress resulting from payment of her student loan obligation. Unfortunately, this fact provides insufficient justification to disregard the fundamental standard of the first prong of *Brunner*." *Id.* The court went on to say:

> Life is filled with many sources of stress. Because no one can eliminate every stress, mental health must incorporate the ability to cope with and to respond to unavoidably stressful circumstances. While allowing the debtor to discharge many other sources of economic stress, the Bankruptcy Code creates an exclusion for the stressful repayment of student

> loans. In the present instance, section 523(a)(8) of the Bankruptcy Code essentially compels the debtor to address rather than to avoid the challenge of student-loan repayment. The court may discharge a student loan only when payment would necessarily impair the debtor's ability to maintain a minimal standard of living. Because the debtor now derives sufficient income both to pay her student loan and to preserve a minimal living standard, her student-loan obligations are not dischargeable in the present instance.

Id. at 511.

Like N.M., Reynolds could repay her debt despite her mental condition. But unlike Reynolds, the bankruptcy court denied N.M. relief because she was able to repay her debt. And under the *Brunner* test, because N.M. did not satisfy the first prong, the court ended its analysis. This alone illustrates the critical difference between the two tests. The *Brunner* test is simpler and more efficient. Unlike the *Brunner* test, the totality-of-the-circumstances test requires the court to continue the analysis and speculate about what the future holds. Although the Eighth Circuit wants "a less restrictive approach," or more discretion, the essential question is whether the debtor is financially able to repay the debt. *Long*, 322 F.3d at 554. Once the debtor's present ability to repay a student-loan debt is proved, it is unnecessary to evaluate the debtor's future ability to repay. Discretion, particularly when it is based on speculation, does not justify relieving a debtor who is able to repay a debt from the obligation to do so.

5. *Because the Eighth Circuit's test has lowered the legal standard and created disparate results, this Court should resolve the conflict between the circuits.*

A consistent standard for determining undue hardship is essential, as other circuit courts have recognized. "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." *Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302, 1312 (10th Cir. 2004) (Judge Lucero concurring). The Fourth Circuit echoed this logic when it stated:

> Applying a looser standard, courts would inevitably reach inconsistent results across bankruptcy cases. Some loan recipients would obtain discharge while others in similar circumstances would unfairly remain obligated. A looser standard would also be unfair to the vast majority of loan recipients who do not attempt to discharge their loans and meet their obligations even with much self-sacrifice.

Frushour, 433 F.3d at 403-04.

Nine of the circuit courts of appeal have maintained consistency by applying the *Brunner* test for undue hardship. Debtors in similar circumstances are treated equally, no matter in which of those nine circuits an undue hardship action is brought. If the

debtor is presently able to repay the student-loan debt, the debt will not be discharged. The Eighth Circuit's adoption of a less restrictive totality-of-the-circumstances approach creates a gross inconsistency. Some debtors who are able to repay their student-loan debt may be discharged in the Eighth Circuit when similarly situated debtors elsewhere will not be. This is not only inconsistent, it is inequitable. It is therefore necessary for this Court to resolve the conflict by determining the appropriate test for the undue-hardship standard.

B. This case presents an important federal question about what test best guides courts in determining whether student loans should be discharged under § 523(a)(8).

Bankruptcy laws throughout the country must be uniform. The tests applied under those laws must necessarily also be uniform. Because there are now two conflicting tests for undue hardship in the context of student-loan discharges in bankruptcy, this Court should determine which test is the appropriate one and clarify what Congress intended "undue hardship" to mean.

1. "[B]ankruptcy laws must be uniform throughout the United States."[8]

The Constitution gives Congress the power to establish "uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. In discussing the history of bankruptcy laws in *Central Va. Cmty. College v Katz*, ___ U.S. ___, 126 S. Ct. 990, 163 L.Ed.2d 945 (2006), this Court recognized that the core purpose of a national bankruptcy law is to redress the "rampant injustice" and avoid the difficulties caused a "patchwork" of differing state laws. *Id.*

[8] *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468, 102 S. Ct. 1169, 71 L.Ed.2d 335 (1982).

If this Court does not adopt a uniform standard for undue-hardship determinations, debtors in some states will be freed from their obligation to repay their student-loan debt while debtors in similar circumstances elsewhere in the country will not. Further, a lower standard that frees more debtors threatens the financial integrity of the federal student-loan program and opens the door for abuse by student-loan debtors.

2. Congress intended the high standard of the undue-hardship exception have two purposes: protection and prevention.

The undue-hardship exception serves two purposes: (1) to protect the financial integrity of the student-loan program, and (2) to prevent undeserving debtors from abusing the bankruptcy process. *See Pelkowski v. Ohio Student Loan Comm'n (In re Pelkowski)*, 990 F.2d 737, 743 (3d Cir. 1993); *see also Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 742 (6th Cir. 1992) ("Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of educational loan programs.") In *Brunner*, the district court recognized that the student-loan program is different from normal lending programs. *Brunner*, 46 B.R. at 756. Because of this

difference it needs the protection that the undue-hardship exception provides. Limiting the circumstances under which student-loan debts can be discharged in bankruptcy helps preserve the financial integrity of the student-loan program. *Pelkowski*, 990 F.2d at 744 (citations omitted). As the Fourth Circuit stated:

> It is thus understandable why Congress would "exact[ ] a quid pro quo" for government-guaranteed loans by using the undue-hardship standard. Debtors receive valuable benefits from congressionally authorized loans, but Congress in turn requires loan recipients to repay them in all but the most dire circumstances. This heightened standard protects the integrity of the student-loan program and saves it "from fiscal doom." It also ensures public support for the program by preventing debtors from easily discharging their debts at the expense of the taxpayers who made possible their educations.

Frushour, 433 F.3d at 399-400 (citations omitted).

By adopting a lower standard, the Eighth Circuit has lowered the protection the statute provides to the student-loan program and increased the chances of abuse. When the Eighth Circuit created its own "less restrictive approach," it undermined the very purposes of the undue-hardship exception.

3. The Brunner test best serves the purposes of the statute.

The Brunner test's requirements ensure that debtors who are able to repay their student-loan debt will not be relieved of their obligation to do so. The debtor may be discharged only if he or she is unable to repay the debt for a significant portion of the repayment period for reasons beyond the debtor's control. This is consistent with the purpose, the language, and the legislative history of the of the undue-hardship exception.

The Fourth Circuit noted that "the ordinary meaning of 'undue' gives us clear guidance. 'Undue' generally means 'unwarranted' or 'excessive.' Because Congress selected the word 'undue,' the required hardship under § 523(a)(8) must be more than the usual hardship that accompanies bankruptcy." *Frushour*, 433 F.3d at 400 (citations omitted); *Rifino*, 245 F.3d at 1087 (noting that by using the adjective "undue" Congress viewed "garden-variety hardship as insufficient" to discharge student-loan debt); *Brunner*, 46 B.R. at 753 (same). In other words, the hardship must be more than the usual hardship that accompanies repaying ones debts.

Further evidence of Congressional intent can be learned from the changes that have and have not been made to the undue-hardship exception. Since its enactment, Congress has (1) expanded it to Chapter 13 bankruptcies, (2) eliminated the ability to discharge student loans based solely on the amount of time in repayment, and (3) expanded the types of educational

loans that fall under the exception.[9] The Eleventh Circuit recognized the meaning of these changes: "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." *Cox*, 338 F.3d at 1243; *see Johnson v. Mo. Baptist College (In re Johnson)*, 218 B.R. 449, 453 (B.A.P. 8th Cir. 1998) ("In the years following its enactment, amendments to 11 U.S.C. § 523(a)(8) have clearly reflected a congressional design to further limit the dischargeability of educational obligations.").

Further, it is significant that since 1987 when the *Brunner* test was established by the Second Circuit, Congress has amended the Bankruptcy Code several

[9] At first, § 523(a)(8) only applied to Chapter 7 bankruptcies. *See* Jerome M. Organ, *'Good Faith' and the Discharge of Education Loans in Chapter 13: Forging a Judicial Consensus*, 38 Vand. L. Rev. 1087, 1093-1100 (1985). Debtors in Chapter 13 bankruptcies could still discharge their student loans. *See id.* at 1100-1104. Courts responded to the tension between the purpose of § 523(a)(8) and debtors who were using Chapter 13 to discharge their student loan debt without making substantial and meaningful payments. *See id.* at 1104-1117. In 1990, Congress reacted and extended Section 523(a)(8) to Chapter 13 bankruptcies. Pub. L. 101-508, § 3007 (the provision originally contained a sunset provision that was repealed by Pub. L. 102-325, § 1558). Shortly thereafter, Congress increased the five-year discharge provision of Section 523(a)(8)(A) to seven years. Pub. L. 101-647, § 3621. And, in 1998, Congress eliminated a time based basis for discharge altogether. Pub. L. 105-244, § 971(a). Most recently, under the BAPCA, Congress expanded the types of loans that fall under Section 523(a)(8) and required certain debtors to choose a repayment plan under Chapter 13 rather than a liquidation under Chapter 7. These changes clearly demonstrate Congressional intent to make it harder for debtors to discharge their debt, especially student loan debt, without repaying it.

times but has not once attempted to alter or affect the most widely used test for undue hardship. To the contrary, Congress has continually limited the dischargeability of student loans while expanding the types of educational loans that were covered by the exception. And during this time more and more circuits continued to adopt the *Brunner* test. This could be seen as an implicit recognition by Congress that *Brunner* is the appropriate test for undue hardship determinations.

Additionally, courts have considered statements made in the Report by the Commission on the Bankruptcy Laws of the United States as indicative of Congressional intent. *Brunner*, 46 B.R. at 754. The Commission's Report stated that "student loans should not as a matter of policy be dischargeable before (the debtor) has demonstrated that for any reason he (or she) is unable to earn sufficient income to maintain himself (or herself) and his (or her) 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), *quoted in Andrews*, 661 F.2d at 704; *Roberson*, 999 F.2d at 1135; *Brunner*, 46 B.R. at 754. It also stated, "[T]he total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and (the debtor's) dependents, at a minimal standard of living within their management capability, as well as to pay the educational debt. *Andrews*, 661 F.2d at 704 (quoting 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, 140-41 n.17).

Thus, the *Brunner* test assures a student-loan debtor a minimal standard of living but requires the debtor to devote all of her disposable pay to repayment of the student-loan debt would be inconsistent requirement is consistent with the language, legislative history and purposes of the undue to allow hardship exception.

4. The Eighth Circuit's rejection of the Brunner test was unjustified.

The *Long* panel's rejection of the *Brunner* test was based on the panel's desire to have a "less restrictive approach" to undue hardship determinations. *Long*, 322 F.3d at 554. According to the court, "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)."[10] *Id.* The court went on to say, "[w]e believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy." *Id.*

There are two problems with viewing the undue-hardship analysis as discretionary based on fairness and equity. First, it conflicts with the primary holding of *Long*, which is that the undue-hardship determination is a question of law that is reviewed de novo. *Id.* at 553. A legal standard is not based on discretion. Second,

[10] The Bankruptcy Code was amended, effective October 7, 1998, and no longer includes a subsection B. Higher Education Amendments of 1998, Pub. L. 105-244, tit. IX, § 971(b), 112 Stat. 1581, 1837.

every case, even one under the *Brunner* test is examined on the unique facts and circumstances presented. Using "fairness and equity" as guiding principles creates a floating standard that results in an entirely different inequity because of "the pervasive lack of certainty and the diversity of results." *Andresen v. Neb. Student Loan Program, Inc. (In re Andresen)*, 232 B.R. 127, 136 (B.A.P. 8th Cir. 1999) (noting that using "a broad grant of discretion" or "principles of fairness" creates uncertainty and a diversity of results). Indeed, "[l]egal 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." *Polleys*, 356 F.3d at 1309 (quoting *In re Plunkett*, 82 F.3d. 738, 741 (7th Cir. 1996)). Courts are provided no clear guidance about how to apply the legal standard. Allowing such discretion and "fairness" to control the outcome makes the jurisdiction where the case is brought more determinative than its unique facts and circumstances. As a result, our bankruptcy laws would no longer be uniform in violation of the constitutional mandate.

CONCLUSION

Our system of jurisprudence rests on the principle of precedent—that like cases will be decided in a like manner. Predictability and uniformity are essential for our courts. Our Constitution requires uniformity in bankruptcy law. Congress has enacted and expanded a statute to make it clear that student-loan debt is not dischargeable except in the most extreme circumstances, and not at all if the debtor has

the financial ability to repay the debt. Nine circuit courts of appeal apply the *Brunner* test, which prevents bankruptcy courts from discharging the student-loan debt of debtors who have the ability to pay the debt. But the Eighth Circuit has devised a unique totality-of-the-circumstances test that is unsupported by the Constitution, statute, or sound precedent, and held that a debtor who is financially capable of repaying her student-loan debt does not have to. As a result, debtors who file for bankruptcy in the Eighth Circuit and seek to have their student-loan debt discharged—even though they could repay it—will have a profound advantage over debtors in other circuits who will be bound to honor their debt to the government. Allowing the two tests to operate in different circuits would violate the constitutional requirement of uniformity in bankruptcy law, undermine decades of legal jurisprudence, and erode a cornerstone of our system of jurisprudence. For all these reasons, this Court should grant a writ of certiorari.

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No. 04-3192, No. 04-3722
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Laura Susan Reynolds, Debtor, Laura Susan Reynolds,
Plaintiff - Appellee,

v.

Pennsylvania Higher Education Assistance Agency; Defendant - Appellant, The Education Resource Institute; Hemar Insurance Corporation of America; Defendants, Educational Credit Management Corporation, Defendant - Appellant.
In re: Laura Susan Reynolds, Debtor, Laura Susan Reynolds,
Plaintiff - Appellee,

v.

Pennsylvania Higher Education Assistance Agency; The Education Resource Institute; Hemar Insurance Corporation of America; Educational Credit Management Corporation; Defendants, U.S. Department of Education,
Defendant - Appellant.

June 24, 2005, Submitted

October 10, 2005, Filed

COUNSEL: For LAURA SUSAN REYNOLDS, Plaintiff - Appellee: Andrew Robert Toftey, Monica L. Clark, DORSEY & WHITNEY, Minneapolis, MN;

Jonathan A. Strauss, FLYNN & GASKINS, Minneapolis, MN.

For PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, THE EDUCATION RESOURCE INSTITUTE, Defendants - Appellants: Philip R. Schenkenberg, Michael David Gordon, BRIGGS & MORGAN, Minneapolis, MN.

For HEMAR INSURANCE CORPORATION OF AMERICA, Defendants: Philip R. Schenkenberg, BRIGGS & MORGAN, Minneapolis, MN.

For Curtis P. Zaun, St. Paul, MN; Philip R. Schenkenberg, Michael David Gordon, BRIGGS & MORGAN, Minneapolis, MN.

JUDGES: Before RILEY, BRIGHT, and JOHN R. GIBSON, Circuit Judges. JOHN R. GIBSON, Circuit Judge, wrote the opinion; RILEY, Circuit Judge, dissenting; BRIGHT, Circuit Judge, concurring.

OPINION BY: JOHN R. GIBSON

OPINION: JOHN R. GIBSON, Circuit Judge.

The United States Department of Education, Pennsylvania Higher Education Assistance Agency, and Educational Credit Management Corporation appeal from the district court's[1] affirmance of the bankruptcy court's[2] order, which held that Laura Susan

Reynolds's student loans were discharged in bankruptcy. The creditors contend that the bankruptcy court erred in discharging the debts on the ground of undue hardship when that court had previously found that Reynolds had the financial resources to pay some portion of the student loans. Reynolds contends that undue hardship is not a strictly pecuniary test and that the bankruptcy court correctly held that the detrimental effect of the loans on Reynolds's precarious mental health warranted discharging the debts. We affirm.

Reynolds began suffering from depressive symptoms as early as middle school and high school, but did not receive treatment or diagnosis at that time. During her junior year at Claremont McKenna College, she suffered a mental health crisis while traveling in Scotland and had to drop out of a study abroad program; on arriving home, she was treated by a psychiatrist for agoraphobia and depression. She received counseling, and, despite a continuing struggle with depression and panic attacks, she was able to make up the missed coursework and to graduate cum laude in 1992. She went on to attend the University of Michigan law school, where her depression worsened, but she nevertheless graduated in 1995, in the middle of her class. She passed the Colorado bar exam and was admitted to practice law in that state.

She undertook an extensive search for a job as a lawyer, participating in on-campus interviews, sending out more than 400 resumes, contacting Michigan alumni, and eventually using a legal employment consultant. Unfortunately, she was never able to find any work as an attorney, other than two hours' work

for a friend of her father's. She finally began taking temporary assignments through an employment agency, working as a secretary or administrative assistant. In October 1999, she took a permanent job as an administrative assistant at the St. Paul Foundation, where she worked until the spring of 2001. She left that job, but began another permanent job as secretary-receptionist at a roofing contractor, where she still works, earning about $ 30,000 per year. She is married, and her husband makes about $ 29,000 per year driving a school bus.

After leaving school, Reynolds began payments on the loans, but she was only able to make the payments by paying for "everything else" with credit cards. Eventually, she stopped making payments.

Since graduating from law school, Reynolds has seen a number of mental health professionals and has taken a number of medications, such as anti-depressants, mood-stabilizers, and anti-psychotic medications. In August 2001, she was diagnosed with major depressive illness and chronic dysthymic disorder, which is a depression that does not meet the full criteria for major depressive illness. She also suffers from anxiety and panic disorders. In addition to the anxiety, panic attacks and depression, Reynolds has a persistent personality disorder. Her psychiatric expert, Dr. Robert Jones, reported that the "combination of major depression and personality dysfunction often present with the personality disorder being more dysfunctional than would actually be the case if adaptation were not impaired by the affective disorder." Her medications reduce her symptoms, but their effectiveness tends to wane the longer she takes them. Dr. Jones opined that

no regimen of medication has been able to bring about a sustained partial remission of her mental illness. Reynolds said that at the time of trial she habitually slept at least ten hours a night during the week and sixteen hours a night on weekends, and she testified that she engaged in self-injury, such as cutting herself. Reynolds suffers side effects from her various medications, including numbness in her extremities, drowsiness, distraction, and itching.

Dr. Jones testified that Reynolds's student loans caused her stress, and that stress "can make it more difficult for an individual to respond to treatment for a mood disorder." He stated, "To the extent that she is overwhelmed by indebtedness and can't see the possibilities of her life beyond that indebtedness," the debts made it harder for her to sustain improvement in her depressive illness. Reynolds herself testified that her inability to pay the loans made her feel "like a failure and hopeless and ashamed."

Dr. Jones opined that Reynolds was not able to practice law because she would not be able to provide "interpersonal consultative services" due to personality characteristics and because of the "cognitive deficits associated with intermittent exacerbations of depressive illness." Although Reynolds could be expected to suffer exacerbations of her depression, she ought to be able to function in a job setting similar to that of her most recent administrative-secretarial jobs. But he concluded, "Despite her capacity to return to employment, the inconsistencies in her performance as a result of both depressive illness and characterologic instability, may present challenges to employers who

rely on consistency at the level of teamwork and work group membership."

Reynolds owed outstanding student loans to five creditors amounting to more than $ 142,000 in March 2002. If amortized over ten years, the monthly payments would be $ 1,641.04, and if amortized over twenty years, $ 1,021.55. Two of the student-loan creditors, Hemar Insurance Corporation of America and The Educational Resource Institute, did not appeal from the discharge order, so Reynolds is no longer responsible for those debts, which would account for $ 715.50 of her monthly liability under a ten-year payment plan or $ 408.06 under a twenty-year plan. The debts to the three remaining creditors are eligible for consolidation under the William D. Ford Direct Loan Program, which would allow Reynolds to pay the loans over a thirty-year period, beginning with an initial monthly payment amount of $ 502.49.

Reynolds's and her husband's combined monthly income was about $ 3,300, and the bankruptcy court found their household expenses were $ 2,600, 303 B.R. 823, 834, although as we will discuss later, both sides dispute those figures.

Reynolds filed a voluntary bankruptcy petition under Chapter 7 on June 20, 2000. She initiated an adversary proceeding for a determination of dischargeability of the student loans under 11 U.S.C. § 523(a)(8)(2000).[3] Under section 523(a)(8) (2000), a discharge in bankruptcy does not discharge a debtor 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, "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor." The bankruptcy court therefore was required to determine whether exempting the student loans from Reynolds's discharge in bankruptcy would impose an undue hardship on her.

The bankruptcy court applied the "totality of the circumstances" test this court set out for determining undue hardship in *In re Long*, 322 F.3d 549, 554 (8th Cir. 2003). *Reynolds v. Pa. Higher Educ. Assistance Ag'cy*, 303 B. R. 823, 836 (Bankr. D. Minn. 2004). Under that test, the court considers (1) the debtor's past, present and future financial resources, (2) the debtor's reasonable and necessary living expenses, and (3) any other relevant circumstances. See *Long*, 322 F.3d at 554. The bankruptcy court observed that the burden of proving undue hardship lay with Reynolds. *Id.* at 826.

To determine probable financial resources, the bankruptcy court examined the medical evidence and found that there was no prospect that Reynolds's condition would improve to such an extent that she could practice law or even work as a paralegal.[4] *Id.* at 832. The court found that the best Reynolds could do was to remain in the type of job she currently holds, if indeed she is able to perform that job without lapsing into depression or engaging in behavioral incidents connected with her personality disorder, which would be likely to cause her to lose her job or quit. Id. Therefore, the court used Reynolds's current income and expense figures to decide whether Reynolds could pay any or all of the debts without undue hardship. *Id.* at 834. The court figured that Reynolds and her

husband had $ 700 per month of income in excess of their expenses. Id. The bankruptcy court stated:

> In the last instance, the Debtor did not establish, as a matter of fact, that she lacked all means to pay down all of the component loans in her educational debt structure.
>
> . . .
>
> So this proceeding presents a debtor who has some repayment ability in fact, which could be applied to a portion of the referent debt.

Id. at 838.

However, the bankruptcy court found that there was an important countervailing circumstance - that the existence of the debts was injurious to Reynolds's fragile mental health.

> Here, the Debtor has been most accurately diagnosed as suffering from "major depressive episode, recurrent, severe," "panic disorder with history of agoraphobia," and "personality disorder . . . with borderline, histrionic, and narcissistic features, including some evidence of dissociation under stress." She has been professionally recognized as subject to "psychosocial stressors related to problems with," inter alia, "economic problems and problems related to the interaction with the legal system." Her "notable distress[] with regard to her financial obligations, previous bankruptcy experience, and the continuing struggle to

> remain solvent in the face of her experience of overwhelming indebtedness" was recognized on evaluation as a major stressor. Her depression, panic attacks, and "brief suicidal thoughts and dissociative episodes" continued during the pendency of this litigation despite the fact that she was taking concerted action to try to cope with this problem.

303 B.R. at 839-40. The bankruptcy court concluded that

> It is a matter of inference, but one that has ample support in the record: the extraction of her educational-loan liability from her financial picture would lessen her overall stress level, mitigate her distractability, and significantly reduce the chances of recurring depression and decompensation.[5] . . . On the other hand, there is really no doubt that preserving the Debtor's liability for even a portion of her education loan burden would impose a hardship on her. . . . And, as it must be said, under the totality of her circumstances, the hardship would be "undue."

Id. at 840. The court acknowledged that "subordinating financial circumstances to non-pecuniary ones under [*Andrews v. S.D. Student Loan Assistance Corp.*, 661 F.2d 702 (8th Cir. 1981)] should be reserved only for the extraordinary case, one where the potential of non-pecuniary hardship is manifest, palpable, and of great magnitude. This is one such." *Id.* at 841. Accordingly, the bankruptcy court held that the debts were discharged. Id.

All five student loan creditors appealed to the district court. The district court affirmed the bankruptcy court's holding that the deleterious effect of the debts on Reynolds's mental health could establish undue hardship notwithstanding her financial ability to pay some portion of the debts. *United States Dep't of Educ. v. Reynolds*, 2004 U.S. Dist. LEXIS 15063, No. 04-1020 ADM, [slip op.] at 9 (D. Minn. Aug. 2, 2004). The court further held that the bankruptcy court's findings of fact concerning Reynolds's inability to increase her income and concerning her household income and expenses were not clearly erroneous. 2004 U.S. Dist. LEXIS 15063, [slip op.] at 10. The district court therefore affirmed the holding of dischargeability.

Three of the five creditors, the United States Department of Education, the Pennsylvania Higher Education Assistance Agency, and the Education Credit Management Corporation, have appealed to this court.

I.

In a bankruptcy appeal, this court sits as a second court of review; we therefore apply the same standards of review to the bankruptcy court's decision as the district court does. *Dapec, Inc. v. SBA (In re MBA Poultry, LLC)*, 291 F.3d 528, 533 (8th Cir. 2002). We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Id. The question of whether declining to discharge the debts would pose an undue hardship to Reynolds is a question of law, which we review de novo. *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). Subsidiary findings of fact on which the legal conclusion is based are reviewed for clear error. See id.

(undue hardship determination "requires a conclusion regarding the legal effect of the Bankruptcy Court's findings as to [the debtor's] circumstances"); *Tenn. Student Assistance Corp. v. Hornsby*, 144 F.3d 433, 436 (6th Cir. 1998) (factual findings underlying undue hardship determination will not be set aside unless clearly erroneous).

11 U.S.C. § 523(a)(8) specifies that student loans will not be discharged unless failure to discharge would work an "undue hardship" on the debtor or the debtor's dependents, but the statute does not define the term. In 1981 we interpreted "undue hardship" to require examination of the totality of circumstances, quoting *In re Wegfehrt*, 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981):

> Each bankruptcy case involving a student loan must be examined on the facts and circumstances surrounding that particular bankruptcy for the Court to make a determination of "undue hardship." The bankruptcy court must determine whether there would be anything left from the debtor's estimated future income to enable the debtor to make some payment on his/her student loan without reducing what the debtor and his/her dependents need to maintain a minimal standard of living.

Andrews v. S.D. Student Loan Assistance Corp., 661 F.2d 702, 704 (8th Cir. 1981). After Andrews was decided, the Second Circuit adopted a different test in Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987), a three-step sequential analysis which has attracted a wide following. See Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302,

1307 (10th Cir. 2004) (collecting cases). However, in Long we rejected the Brunner test and reaffirmed our reliance on the Andrews totality of the circumstances test. 322 F.3d at 554. We explained,

> 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.

Id.

We then summarized the totality of circumstances test as applied in this circuit:

> 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. 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. 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 554-55 (citations omitted).

The creditors argue that if the debtor has the economic ability to repay the debt, this fact ends the inquiry as to undue hardship, and the bankruptcy court had no further warrant to consider the effect of the continuing student loan liability on Reynolds's health. The creditors base their argument on one passage from Long: "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." 322 F.3d at 554-55.

We are of the thought that the creditors read this language too narrowly. In Long, we reaffirmed our adherence to the totality of circumstances analysis, and we did so particularly in order to preserve the "inherent discretion" we found in the statutory language and to safeguard the flexibility to be able to respond appropriately to "unique facts and circumstances." *Id.* at 554. To espouse the creditors' proposed interpretation, we would have to ignore the possibility - and in many cases reality - that a debtor's health and financial position are inextricably intertwined. This reality was discussed at length in *Andrews*, 661 F.2d at 705, where the court expressly stated that the bankruptcy court

had properly considered the debtor's disease as a factor in determination of undue hardship. As recognized in Andrews, illness often affects both a debtor's ability to earn and her expenses; in such cases, factors affecting the debtor's health also have a financial significance. Where the evidence shows that financial obligations are likely to undermine a debtor's health, which in turn will affect the debtor's financial outlook, we think it entirely consistent with Andrews and Long to take such facts and circumstances into account. We will not adopt an interpretation of "undue hardship" that causes the courts to shut their eyes to factors that may lead to disaster, both personal and financial, for a suffering debtor.

Here, in findings that are not clearly erroneous, the bankruptcy court found that the continuing liability from the debts would pose a threat to Reynolds's fragile mental health. 303 B. R. at 840. Although Reynolds may be performing adequately at her current job and may therefore have some disposable income available to dedicate to the debts, the bankruptcy court found that she was at risk for recurrence of symptoms that would cause "voluntary or involuntary termination" of that employment. *Id.* at 832. The court found "the mere existence of this debt burden clearly is a significant block to the Debtor's recovery from mental illness." *Id.* at 837. Conversely, eliminating the debt would mitigate her symptoms and reduce the possibility of recurring depression and decompensation. *Id.* at 840. These conclusions are inferences well-supported by the record evidence of Reynolds's condition.

Another compelling reason for affirming the order of

the bankruptcy court is the diagnosis articulated by both the doctors. Dr. Jones stated that Reynolds's diagnostic evaluation included "major depressive episode, recurrent, dysthymia," and as we have observed before, he stated that there has been no sustained partial remission of her illness. Dr. Gratzer stated that the diagnostic impression, axis I, was "Major depressive disorder, recurrent, in near full remission," and "Dysthymia."

We evaluate Reynolds's condition in light of Long's requirement that determination of undue hardship requires consideration of "reasonably reliable future financial resources . . . and any other relevant facts and circumstances surrounding each . . . case" and must include "the prospect of future changes - positive or adverse - in debtor's financial position." 322 F.3d at 554-55. We take this together with Andrews' statement, "Serious illness all too often requires extensive treatment and medication. Serious illness may affect an individual's ability to work." 661 F.2d at 705. The diagnosis of the doctors gives further compelling reason to affirm the order of the district court. A condition that is recurrent by its very terms is one that will occur again. See Dorland's Illustrated Medical Dictionary 1434 (28th ed. 1994) (recurrent means "returning after remissions"). A remission is an abatement of the symptoms of a disease. Id. at 1444. Thus, the issue stressed by the bankruptcy court with reference to the stressors affecting Reynolds must also be considered with the recurring nature of her illness and the impact on not only her future health, but her future financial situation.[6]

We therefore see no error in the bankruptcy court's

holding that excepting the student loans from the discharge would cause an undue hardship to Reynolds because of the effect of the debts on Reynolds's mental health.

II.

Two of the creditors, the Pennsylvania Higher Education Assistance Agency and the Educational Credit Management Corporation contend that the bankruptcy court erred in its factual findings concerning the details of Reynolds's household expenses and in determining Reynolds's earning potential. A related issue, not briefed by the parties until after it surfaced at oral argument, was whether the bankruptcy court should have included Reynolds's husband's income as if it were her own, even though the husband is not a debtor in bankruptcy. Because the bankruptcy court's holding was not ultimately based on financial details of whether Reynolds could afford monthly payments, we conclude that the resolution of these arguments would not affect our holding, and we therefore need not reach them.

The Pennsylvania Higher Education Assistance Agency has moved to strike portions of Reynolds's brief and appendix that rely on her deposition testimony. The challenged testimony is substantially reiterated in Reynolds's trial testimony, and so no part of our holding relies on the challenged testimony. We therefore dismiss the motion as moot.

We affirm the district court's order in turn affirming the judgment of the bankruptcy court.

CONCURBY: BRIGHT

CONCUR: BRIGHT, Circuit Judge, concurring.

I join in Judge John R. Gibson's opinion affirming the judgment in this case. I add another dimension to the reasons for the determinations of the bankruptcy court and the district court on appeal discharging the student loans for "undue hardship."

The dissent asserts the debtor has sufficient surplus ($ 700 per month) to pay her student loans ($ 502.49 per month on an extended thirty-year repayment plan). Infra at 21. That analysis is incorrect based on the record in this case, which is the record before the bankruptcy court and the district court.[7]

The total loans prior to this appeal amounted to $ 142,044.55 in March 2002. The debtor owed her five student lenders either $ 1641.05 per month over ten years, $ 1021.55 per month over twenty years, $ 1218 per month for the first ten years of a thirty-year plan (two of the lenders do not participate in the Ford loan program, thus not allowing for a thirty-year repayment period), or $ 910.55 per month for the first twenty years of a thirty-year plan. However the loan obligations are added, the $ 700 per month in disposable income that the bankruptcy court allocated to Reynolds and her husband does not sufficiently cover any of these payments.

Moreover, the $ 700 per month surplus results from combined compensation of both Reynolds and her husband John Turner minus family living expenses. The record shows in a rough way that each contributed

about equally to the family income and each incurred about equally to the family living expenses.

The appellants here would apply all of the surplus to the debtor's educational debts. Yet, these debts were incurred prior to Reynolds's marriage. The appellants and the dissent give no consideration to Mr. Turner's interests. Mr. Turner is not a party to these proceedings, and there is no showing that he assumed to pay his wife's loans. Attributing the entire surplus of $ 700 to the debtor's loans requires Mr. Turner to pay for loans on which he is not obligated.

There is no warrant for such treatment of Mr. Turner. Equitably speaking, Mr. Turner should be entitled to approximately half of the surplus to put to his use to educate his children, to save for the future, or for any other reason. That is, the part of the surplus remaining after contribution to the basic household expenses and attributable to his income. Thus, in fact, under this record only about $ 350 of the surplus remains in the household budget that could be attributed to the debtor's income.

This analysis is supported by the following cases: *In re Innes*, 284 B.R. 496, 507-08 (D. Kan. 2002) ("The bankruptcy court correctly considered all of [the nondebtor spouse's] disposable income and applied the proportionate share of her income to the family's essential or basic living expenses. To require her to do more would essentially force her (or her children) to pay debts for which she is not liable and support [the debtor husband] while being denied the right to apply some of her income to reasonable non-luxury items, such as the children's education, and a modest

retirement fund."); *In re Berndt*, 127 B.R. 222, 225 (Bankr. D.N.D. 1991) (holding, in a Chapter 7 consumer debt case, "The non-debtor spouse's income is not . . . rendered liable for the debts of the Debtor but rather is simply . . . considered in determining whether the Debtor himself has available discretionary income by virtue of the fact that he and the non-debtor spouse share a joint household.").

The strongest case in support of the creditors' view is *In re White*, 243 B.R. 498, 508-14 (Bankr. N.D. Ala. 1999), where the court combined the non-debtor spouse's and debtor's incomes and then deducted household expenses to determine if a surplus existed. However, White is distinguishable because the debtor in that case attempted to avoid paying student loan debt by contributing toward household expenses far in excess of a minimal standard of living. See *id.* at 512-14. This case is also distinguishable from the context where a debtor chooses not to work to her earning capacity then seeks to discharge her student loans for lack of income. *In re Murphy*, 305 B.R. 780, 793-95 (Bankr. E.D. Va. 2004); see *In re Oyler*, 397 F.3d 382, 386 (6th Cir. 2005) ("Choosing a low-paying job cannot merit undue hardship relief.").

While it is true that the income and expenses of husband and wife are combined for the purpose of examining a household's finances, it does not seem proper, in the circumstances where the debtor and non-debtor spouse have contributed about equally to the family income and expenses, to attribute the entire surplus to the debtor in favor of the debtor's creditors.[8]

There is no showing that applying the $ 350 per month surplus, attributable to the debtor's income, would reduce or retire the loans, considering interest growth on the debt. Additionally, given the nature of the debtor's illness, the " $ 100 [per month] cushion for various aspects of her medical condition," infra at 20, does not allow her a realistic reserve for possible deterioration of her health condition.

DISSENTBY: Riley

DISSENT: RILEY, Circuit Judge, dissenting.

This court's precedents allow a bankruptcy court, when determining whether declining to discharge a student loan constitutes an undue hardship on the debtor, to examine the totality of circumstances affecting a debtor's reasonable future earning power compared to her living expenses. *In re Long*, 322 F.3d 549, 554-55 (8th Cir. 2003); *In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981). These circumstances may include a debtor's serious illness. *Andrews*, 661 F.2d at 704-05.

Reynolds's mental illness could be considered such a circumstance in two possible ways. First, her mental illness may make the mere condition of being in debt severely stressful, thus creating an undue hardship. Or, her mental illness could reduce her reasonably reliable future financial resources (by limiting her job prospects both in and out of the legal profession) and potentially increase her expenses (through medical bills and the like), thus creating an undue hardship. See *id.* at 705. The problem for Reynolds, and the problem with the majority's opinion, is the first method of considering Reynolds's mental illness is not permitted under the

Bankruptcy Code and this court's precedent, and the second method is not supported by the record before the bankruptcy court.

The first possible method of considering Reynolds's mental illness as a circumstance affecting her reasonable future earning power compared to her living expenses - that her mental illness makes the mere condition of being in debt severely stressful, thus creating an undue hardship - is unsupported by this circuit's caselaw interpreting the Bankruptcy Code. When this court has considered serious illness as a factor in the determination of undue hardship, we have done so only in terms of how that illness affects a debtor's potential income and expenses; we have never asked whether the condition of having a debt itself constitutes an undue hardship. See *id.* at 704-05.

The debtor in Andrews suffered from Hodgkin's Disease, a form of lymphatic cancer, although the disease was in remission at the time of her trial. *Id.* at 703. Having cancer surely is stressful, whether in remission or not. The prospect of a large student loan hanging over one's head only could add to that stress. But the Andrews court never asked whether the stress from being in debt could affect the debtor's state of health and thus was a circumstance contributing to undue hardship. The court discussed the disease only in terms of its effects on the debtor's income and expenses:

> Serious illness all too often requires expensive treatment and medication. Serious illness may affect an individual's ability to work. To some extent, as argued by the creditor, the expenses

> associated with a serious illness may be covered by health insurance. On remand the bankruptcy court should carefully examine the scope of the debtor's group health insurance coverage. The bankruptcy court should also consider any additional information about the debtor's present employment status and employment prospects.

Id. at 705.

To view a serious illness other than through its effect on income and expenses borders on illogic circularity. The majority opinion makes this very mistake: it concludes having an unpaid debt contributes to Reynolds's mental illness, and mental illness contributes to the inability to repay the debt (which inability, of course, worsens the mental illness, and so on). Such an analysis grants double treatment to a debtor's illness, which is at odds with the "fairness and equity" required by the totality-of-the-circumstances test. *Long*, 322 F.3d at 554. In asking whether illness itself is an undue hardship, the majority changes this circuit's law - a change I find unwarranted in either law or policy.

Regarding the second possible method of considering Reynolds's mental illness, even assuming the bankruptcy court's findings on Reynolds's income, expenses, and mental illness were substantially supported in the record, those findings do not support a conclusion Reynolds's mental illness makes her reasonable future financial resources insufficient to cover payment of her student loan debt, while still allowing for a minimal standard of living. See *id.* at 555. The record before the bankruptcy court is clear: while

Reynolds's mental illness undoubtedly precludes her ability to enter the legal profession, as either a practicing attorney, paralegal, or legal secretary, Reynolds's psychiatric expert Dr. Robert Jones reported Reynolds can work in a low level clerical or administrative capacity, like the secretary-receptionist position she held at the date of her trial. Relying on this report, the bankruptcy court stated, "As a practical matter, for the indefinite future, she will remain at the level of employment, responsibility, and compensation that she has had since she took her first 'permanent' position with the St. Paul Foundation." *In re Reynolds*, 303 B.R. 823, 832 (Bankr. D. Minn. 2004).

Reynolds's compensation, when combined with her husband's compensation from his employment, amounts to $ 3300 per month. *Id.* at 829. Reynolds's monthly household expenses, even after adding a $ 100 "cushion" for "various aspects of [her] medical condition," amount to $ 2600.[9] *Id.* at 834. Thus, accounting for the effects of Reynolds's mental illness on both her income and expenses, Reynolds still has sufficient surplus ($ 700 per month) to repay her student loans ($ 502.49 per month on an extended 30-year repayment plan) with an extra safety net of nearly $ 200 per month with which to maintain or supplement her current standard of living.[10] *Id.* at 835. Given these facts, our circuit precedent plainly states a student loan debt "should not be discharged." *Long*, 322 F.3d at 555. The record supports no other conclusion.

One has sympathy for Reynolds, who obviously is very bright, being a Michigan Law School Graduate,[11] but suffers from illnesses preventing her from using that intellect in the legal profession. We are, however,

constrained by the Bankruptcy Code as enacted by Congress and by this court's prior cases in determining whether Reynolds's student loans constitute an undue hardship. Therefore, for the reasons stated above, I respectfully dissent.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

n2 The Honorable Gregory F. Kishel, Chief United States Bankruptcy Judge for the District of Minnesota.

n3 Section 523(a)(8) was amended by Pub. L. No. 109-8, Title II, § 220, Title XV, § 1501, 119 Stat. 59, 216 (2005) (effective 180 days after April 20, 2005). We need not consider the question of retroactivity, since the amendments are not material to any issue in this case.

n4 The bankruptcy court discussed the medical testimony presented by the two sides and found that Reynolds's expert, Dr. Jones, was "by far" more credible than the creditors' expert, Dr. Thomas G. Gratzer. 303 B.R. at 833 n. 7. The court stated that, while Jones's and Gratzer's testimony and diagnoses were similar in many respects, Gratzer's testimony was somewhat beside the point, since Gratzer primarily addressed the question of whether Reynolds could work at all, rather than whether she could work as an attorney. Id. This focus on the wrong issue made Gratzer's testimony "simplistic and inaccurate," whereas the court found Jones's testimony "well-supported [,] . . . spontaneously delivered, and resistant to challenge on cross-examination." Id.

n5 In psychiatry, decompensation means "failure of defense mechanisms resulting in progressive personality disintegration." Dorland's Illustrated Medical Dictionary 432 (28th ed. 1994).

n6 The dissent contends that our analysis grants "double treatment to a debtor's illness" which "borders on illogic circularity," infra at 19-20, by taking into account the effect of the debt on the debtor's health as well as the effect of the debtor's health on her income and expenses. We do indeed take into account two different considerations. First, it is in fact the case that Reynolds's mental health has affected, is affecting, and will affect her earnings. The dissent concedes that we should take this into account. Second, the stress of the debt is likely to affect Reynolds's mental health adversely, causing an even greater decline in her earnings. The dissent contends we must ignore the second factor entirely. The statute provides a remedy for "undue hardship." The dissent contends that we are precluded from considering the effect of the debt on Reynolds's health because "the Andrews court never asked whether the stress from being in debt could affect the debtor's state of health and thus was a circumstance contributing to undue hardship." Infra at 19. Andrews did not mention the specific issue, but neither did it say anything that would prevent a court from considering facts before it relevant to the question of undue hardship. Andrews suffered from a form of cancer that was in remission, and there was no evidence such as exists in this case that eliminating the debt would mitigate her symptoms and reduce the possibility of recurrence of the illness. See *Reynolds*, 303 B.R. at 840.

n7 The dissent asserts that the student loans require a payment of a little more than half ($ 502.49) of the amount ($ 910.55) determined by the district court. This legerdemain is accomplished by considering Reynolds's ability to pay after diminishing her debt to exclude student loans from two lenders who choose not to appeal. The dissent errs in two respects: (1) The record before us is that before the bankruptcy court and the district court. We have no warrant to change that record and become a fact finding court rather than the court of appeals. (2) What warrant is there for giving benefit to the remaining lenders for the decision of two lenders not to appeal? It seems to me their decisions not to appeal recognizes the correctness of the decisions in this case by both the bankruptcy court and the district court.

n8 The dissent mistakenly contends that "this issue was not raised or briefed on appeal." Infra at 20 n.9. This court raised this issue at oral argument after which the parties filed letter briefs. It is not unusual for a court to recognize an issue important to an appeal and not raised by the parties. This court was well within its authority to ask the parties to brief this obvious issue when it was not presented below and the non-debtor husband is not a party to the case.

n9 Judge Bright raises an issue in his concurrence regarding the equitableness of including Reynolds's husband's contributions and expenses to these totals. This issue was not raised or briefed on appeal; thus, the majority was correct in not considering it. *United States v. Simmons*, 964 F.2d 763, 777 (8th Cir. 1992) ("As a general rule, an appellate court may review only the issues specifically raised and argued in an

appellant's brief.")

n10 Judge Bright suggests Reynolds's monthly payment from her total student loan debt is $ 910.55. This would be correct had all of her creditors appealed from the Bankruptcy Court's discharge order. As the majority opinion correctly notes, however, two of her creditors did not appeal, thus Reynolds is no longer responsible for those debts, which account for $ 408.06 of Judge Bright's suggested monthly total payment.

n11 *Grutter v. Bollinger*, 539 U.S. 306, 312, 156 L. Ed. 2d 304, 123 S. Ct. 2325 (2003) ("[Michigan] Law School ranks among the Nation's top law schools.").

Civil No. 04-1020 ADM, Civil No. 04-1021 ADM

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

United States Department of Education, Pennsylvania Higher Education Assistance Agency, Hemar Insurance Corporation of America, Educational Credit Management Corporation, and the Education Resource Institute,
Appellants,

v.

Laura Susan Reynolds,
Appellee.

August 2, 2004, Decided

COUNSEL: Curtis P. Zaun, Esq., St. Paul, MN, Educational Credit Management Corporation, on behalf of Appellant Educational Credit Management Corporation.

Philip R. Schenkenberg, Esq., and Michael D. Gordon, Esq., Briggs & Morgan, P.A., St. Paul, MN, on behalf of Appellants Pennsylvania Higher Education Assistance Agency, Hemar Insurance Corporation of America, and the Education Resource Institute.

Roylene A. Champeaux, Assistant United States Attorney, Minneapolis, MN, on behalf of Appellant United States Department of Education.

Monica L. Clark, Esq., and Andrew R. Toftey, Esq., Dorsey & Whitney L.L.P., Minneapolis, MN, and Jonathan A. Strauss, Esq., Flynn, Gaskins & Bennett L.L.P., Minneapolis, MN, on behalf of Appellee Laura Susan Reynolds.

JUDGES: ANN D. MONTGOMERY, U.S. DISTRICT JUDGE.

OPINION BY: ANN D. MONTGOMERY

OPINION:

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is before the undersigned United States District Judge on an appeal from a Bankruptcy Court Order. See *Reynolds v. Penn. Higher Educ. Assist. Agency (In re Reynolds), 303 B.R. 823 (Bankr. D. Minn. 2004)*. Appellants include the United States Department of Education, the Pennsylvania Higher Education Assistance Agency, the Hemar Insurance Corporation of America, the Educational Credit Management Corporation, and the Education Resource Institute (collectively, "Appellants"). Appellants contend that the Bankruptcy Court erred in discharging Appellee Laura Susan Reynolds's ("Reynolds") student loans under federal bankruptcy law, which permits discharge of student loan obligations only when they "impose an undue hardship on the debtor and the debtor's dependents." *11 U.S.C. § 523(a)(8)*. Appellants argue that Reynolds possesses adequate surplus income to repay this debt. Reynolds asserts that the Bankruptcy Court correctly discharged

her loans because the debt imposed an undue hardship on her. For the reasons explained below, the Bankruptcy Court's Opinion discharging Reynolds's student loan debt is affirmed.

II. BACKGROUND

Reynolds filed for Chapter 7 bankruptcy on June 20, 2000. See *In re Reynolds, 303 B.R. at 826*. In April 2002, at the time of the bankruptcy court trial, Reynolds was thirty-two years old. *Id. at 827*. She married her husband John Turner ("Turner") in 1999. Id. Reynolds and Turner share a one-bedroom apartment in St. Paul, Minnesota. Id. Reynolds does not have any children, but Turner has three children for whom he pays child support. Id. The children were ages fourteen, fifteen, and sixteen in April 2002. Id.

A. Reynolds's Educational Background and Employment History

Reynolds graduated *cum laude* from Claremont McKenna College in 1992, and earned a law degree in 1995 from the University of Michigan Law School. Id. After passing the Colorado bar exam on her first attempt, Reynolds was admitted to the Colorado Bar in the fall of 1995. Id. However, her Colorado Bar membership is currently inactive, and she is not admitted to practice law in any other state. Id. To finance her law school education, Reynolds took out several loans, evidenced by the eleven different promissory notes involved in this appeal. *Id. at 826*. Appellants hold the rights to payment of these notes.

Reynolds has almost no work experience as an attorney despite her law degree from the University of Michigan. See *id. 827-28*. She unsuccessfully sought

employment during her third year of law school. *Id. at 828*. In the fall of 1995, Reynolds spent about two hours negotiating with vendors and drafting a contract for a family friend, but has not completed any other legal work since this time. Id. She continued looking for employment as a practicing attorney for about a year after graduating, both in Colorado and in Boston, where she moved in 1996. *Id. 827-28*. While in Boston, Reynolds obtained various short-term clerical positions through temporary-employment agencies since she could not find work as a lawyer. *Id. 828*. She earned from $ 10.00-$ 12.00 per hour at these jobs. Id.

Reynolds moved to the Twin Cities area in August 1997. Id. By then she had "given up hope of working as an attorney," and started working as a temporary secretary for $ 12.00 an hour. Id. She began a permanent position as an administrative assistant at the St. Paul Foundation in October 1999, and worked on reports and other publications. Id. Reynolds's salary was initially $ 29,000 a year, and rose to $ 30,000 during her employment. Id. She received positive to very positive evaluations, but left the Foundation in Spring 2001 without securing other employment. Id. Following her resignation, Reynolds again worked as a temporary secretary for several months. Id. She unsuccessfully applied for a position as a head-noter at West Publishing, and as a clerical assistant for the Minnesota Court of Appeals. Id.

In November 2001, Roof Spec Inc., a local contractor, hired Reynolds as a secretary-receptionist for $ 15.00 per hour. Id. She testified that her net earnings were approximately $ 1700 a month. Reynolds received some "negative feedback" concerning her

attitude and productivity, but retained this position at the time of the trial. Id.

Turner, Reynolds's husband, worked as a standby school bus driver for First Student Transportation as of the trial date. Id. He worked between fifteen to thirty hours a week and was paid $ 13.75 an hour. Id. The Bankruptcy Court estimated that he earned around $ 1300 per month after child support payments were deducted from his wages. *Id. at 829*. However, the Bankruptcy Court ultimately adjusted Turner's net monthly income to $ 1600 per month based on his ability to obtain additional employment. Id. Thus, the estimated total monthly income for the Reynolds-Turner household is $ 3300. Id.

B. Reynolds's Mental Health Concerns and their Impact on Her Employment

Numerous mental health care professionals have diagnosed Reynolds with a variety of mental illnesses including major depression, panic and anxiety disorder, agoraphobia, and borderline personality disorder. Id. Reynolds's problems with mental illness began in junior high and have exacerbated as she has aged. *Id. at 829-30*. She sought treatment for the first time after experiencing a "very bad panic episode" during her junior year of college while traveling in Scotland for a semester abroad program. *Id. at 829*. She left the program and returned to the United States to consult a psychiatrist. Id. Her mental health problems caused her to miss a semester of college, during which she suffered from depression and panic attacks. Id.

Reynolds's depression continued during law school where she remembers the "truly bad depression

started." *Id. at 830*. She obtained treatment after graduating from law school when she returned to Colorado, and consulted with various health care professionals in Boston and Minneapolis. Id. After procuring health insurance to cover the cost, Reynolds began attending regular appointments with a psychotherapist. Id. She takes medication which reduces her symptoms somewhat, though she still experiences feelings of hopelessness and resignation, lethargy, and occasional suicidal thoughts. Id. At trial Reynolds characterized her personal finances, particularly her student debt, as a "major stressor" in her life, and the Bankruptcy Court concluded that stress triggers Reynolds's panic attacks. Id. Reynolds's condition is unlikely to improve from additional medications, as her psychiatric expert testified that "no medication combination has resulted in a substantial sustained partial remission" of her mental health concerns. *Id. at 830-31*.

The Bankruptcy Court found that Reynolds's mental illness precludes her employment as a lawyer, paralegal, or legal secretary. *Id. at 831-32*. While Reynolds is highly intelligent, she has difficulty functioning in non-academic settings because she is excessively self-critical and sensitive to others' criticism of her, and overreacts to ordinary work-place stress. Id. Further, she cannot realistically obtain a license to practice law due to her long-term and ongoing mental health problems. Id. Based on the evidence presented at trial, the Bankruptcy Court determined that Reynolds cannot work beyond "any level of responsibility greater than that of office manager or administrative assistant," but that even these non-legal

positions are beyond her capabilities unless her mental health improves. *Id. at 832*.

C. The Reynolds-Turner Household's Living Expenses and Assets

Reynolds's household living expenses are approximately $ 2600 a month, and include costs for rent, utilities, food, transportation and personal needs. *Id. at 833-34*. Deducting this amount from the Reynolds-Turner household income of $ 3300 leaves a surplus of $ 700 per month.[1] Id.

At the time of the trial, Reynolds and her husband had minimal assets, including a 1992 Mercury Sable, a 1990 Dodge Silhouette, and modest household furnishings. *Id. at 834-35*. Reynolds has a checking account which she normally draws down after paying monthly bills, and does not have any investments or retirement funds. Id.

D. Reynolds's Educational Loan Burden

Reynolds's student debt includes eleven separate loans owed to Appellants. See R. at 215-22. In March 2002, Reynolds owed a total of $ 142,044.55, a figure that now likely exceeds $ 160,000. See *In re Reynolds, 303 B.R. at 835*; Appellee's Br. at 10 n.6. Depending on the terms of repayment, Reynolds's total monthly obligation on the $ 142,044.55 figure is $ 1,641.04 for a ten-year repayment plan, and $ 1,021.55 for a twenty-year plan. See *In re Reynolds, 303 B.R. at 835*. Some of Reynolds's loans are eligible for consolidation under the William D. Ford Direct Loan Program, which provides for a thirty-year repayment period that would lower Reynolds's monthly payment. Id.

Reynolds attempted to repay her loans for the first six months after they became due by charging daily living expenses to credit cards and using her income to pay off her educational debt. Id. However, she could not sustain this pattern and defaulted on the loans. Id. She unsuccessfully attempted to renegotiate payment terms with lenders, and finally concluded that she could not repay her loans given her employment prospects. *Id. at 835-36*.

III. DISCUSSION

Appellants argue that the Bankruptcy Court erred in discharging Reynolds's student loans, in determining that Reynolds maximized her income, and in calculating certain household expenses. Reynolds contends that the Bankruptcy Court properly discharged her student loans under the undue hardship standard.

A. Standard of Review

District courts apply *de novo* review to a bankruptcy court's conclusions of law. *Papio Keno Club, Inc. v. City of Papillion (In re Papio Keno Club, Inc.), 262 F.3d 725, 728-29 (8th Cir. 2001)*. Thus, whether the Bankruptcy Court properly discharged Reynolds's student loan debt under the undue hardship standard is a legal question subject to *de novo* review, and the appellate court must assess "the legal effect of the Bankruptcy Court's findings as to [the debtor's] circumstances." *Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 553 (8th Cir. 2003)*. The bankruptcy court's factual findings are reviewed under the clearly erroneous standard. See *In re Papio Keno Club, Inc., 262 F.3d at 728-29*. A particular finding must stand unless it lacks substantial evidentiary support, or if "the

reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Day v. Johnson, 119 F.3d 650, 654 (8th Cir. 1997)* (citation omitted).

B. Discharge of Reynolds's Student Loans

The chief issue on appeal is whether the Bankruptcy Court properly discharged Reynolds's student loans after determining that this obligation imposed an undue hardship on her mental health, despite her ability to repay some portion of the debt. Student loan debt is exempt from discharge in bankruptcy proceedings unless retention would impose an undue hardship on the debtor and her dependents. See *11 U.S.C. § 523(a)(8)*. The bankruptcy code does not define "undue hardship," but circuit courts have developed two distinct tests to facilitate this determination. See *Long, 322 F.3d at 554-55*; *Brunner v. N.Y. State Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987)*.[2] The Eighth Circuit applies the totality of the circumstances or Andrews test, which considers the following factors: (1) the debtor's past, present and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonably necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. See *Long, 322 F.3d at 554-55*; *Andrews v. S.D. Student Loan Assistance Corp. (In re Andrews), 661 F.2d 702, 704-05 (8th Cir. 1981)*.

The Eighth Circuit has not evaluated the relationship between the test's three prongs, or discussed the balance of pecuniary versus non-pecuniary concerns that might arise in a particular bankruptcy case. Rather, the case law contains an

unresolved tension about which factors, if any, should predominate. Id. For example, in adopting the Andrews test, the Long court embraced a "less restrictive approach to the 'undue hardship' inquiry," and rejected the more rigid Brunner test because "fairness and equity require each . . . case to be examined on [its own] unique facts and circumstances." *322 F.3d at 554*. The Eighth Circuit's adherence to a highly particularized approach suggests that non-financial concerns may authorize discharge even when the debtor has some disposable income. *Id.* Further, the Eighth Circuit has recognized that a debtor's illness or disability is a factor in analyzing undue hardship. See *In re Andrews, 661 F.2d at 704-05*. However, the Long court also held that "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." *Long, 322 F.3d at 554-55*.

Faced with this apparent conflict and overwhelming evidence of Reynolds's debilitating mental illness, the Bankruptcy Court concluded that the Long decision allowed discharge of Reynolds's student loans. *In re Reynolds, 303 B.R. at 840-41*. Chief Bankruptcy Judge Kishel wrote, "nondischargeability poses such negative consequences to [Reynolds's] mental health recovery, that they outweigh her current ability to make payment on at least a portion of her educational loan obligations." *Id. at 841*. Appellants argue that the Bankruptcy Court's decision improperly discharges Reynolds's loans because she possesses adequate surplus income to repay them.

Though recognizing the ambiguity in Long about how non-pecuniary factors interact with pecuniary

concerns under the Andrews test, this Court must affirm the Bankruptcy Court's decision to discharge Reynolds's student loans under the undue hardship standard. As the Bankruptcy Court acknowledged, "a holding of undue hardship despite a demonstration of some ability to pay, should not be done or made lightly." *In re Reynolds, 303 B.R. at 839*. However, subjugating Reynolds's severe mental illness to purely financial considerations undermines Long's adherence to a "less restrictive approach to the 'undue hardship' inquiry" as compared to the more rigid Brunner test. *322 F.3d at 554*. Therefore, the Bankruptcy Court's decision to discharge Reynolds's student loan debt is affirmed.

C. The Bankruptcy Court's Factual Findings

Appellants also appeal several factual findings concerning Reynolds's household expenses and her employability. Specifically, Appellants argue that the Bankruptcy Court erred in the amounts it allocated for emergencies, transportation, auto insurance, "the vagaries of everyday life," and telephone expenses. Additionally, Appellants contend that the Bankruptcy Court failed to consider the elimination of Turner's tax debt and child support obligations, and improperly minimized Reynolds's earning potential.

The Bankruptcy Court's factual findings must stand because they are not clearly erroneous. See *In re Papio Keno Club, Inc., 262 F.3d at 728-29*. Starting with Reynolds's household expenses, the Bankruptcy Court provided substantial evidentiary support and reasoning for its findings, and the Court declines to second-guess its conclusions "to find every possible way to boost a surplus . . . ." *Cline v. Ill. Student Loan Assistance Ass'n (In re Cline), 248 B.R. 347, 351 (8th Cir. B.A.P.*

2000); see also *In re Reynolds, 303 B.R. at 833-35*. Similarly, the Bankruptcy Court properly included Turner's child support obligations in its analysis because at the time of trial, Turner remained responsible for payments on the youngest child for several years into the future. See *In re Reynolds, 303 B.R. at 827*; Tr. at 292-93. Turner also owed a monthly payment of $ 50 for taxes at the time of trial. Tr. at 287. Thus, these findings are not clearly erroneous.

Finally, the Bankruptcy Court's determination that Reynolds cannot realistically obtain employment in the legal field falls within its discretion. At trial, experts testified that Reynolds cannot gain admission to the Minnesota Bar, and other evidence suggested that her functional deficits preclude her from working as a lawyer, paralegal, or legal secretary. *In re Reynolds, 303 B.R. at 831-32*. Consequently, the Bankruptcy Court's conclusions about Reynolds's employability must stand. Because the Bankruptcy Court's findings are not clearly erroneous, they are affirmed. See *In re Papio Keno Club, Inc., 262 F.3d at 728-29*.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that the Bankruptcy Court's Opinion discharging Reynolds's student loan debt in its entirety is affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

ANN D. MONTGOMERY

U.S. DISTRICT JUDGE

Dated: August 2, 2004.

n1 Appellants contest the reasonableness of some of Reynolds's household expenses, and argue that Reynolds has an additional $ 279.99 of disposable income each month. See Appellants' Br. at 17.

n2 To prove undue hardship under the Brunner test, the debtor must meet all three of the following: (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 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 she has made good faith efforts to repay the loans. *Brunner, 831 F.2d at 396*.

BKY 00-32707, ADV 01-3079

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA

In re: LAURA SUSAN REYNOLDS,
Debtor.

LAURA SUSAN REYNOLDS,
Plaintiff,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY, UNITED STATES DEPARTMENT OF EDUCATION, CLAREMONT MCKENNA COLLEGE, SALLIE MAE SERVICING CORP., RISK MANAGEMENT ALTERNATIVES, INC., THE UNIVERSITY OF MICHIGAN, GREAT LAKES HIGHER EDUCATION CORP., HEMAR INSURANCE CORP. OF AMERICA, OSI COLLECTION SERVICES, INC., NCO FINANCIAL SYSTEMS, INC., WINDHAM PROFESSIONALS, VAN RU CREDIT CORP., STUDENT LOAN SERVICING CENTER, NATIONAL ENTERPRISE SYSTEMS, EDUCATIONAL CREDIT MANAGEMENT CORPORATION, EDUSERV TECHNOLOGIES, INC., and THE EDUCATION RESOURCE INSTITUTE,
Defendants.

January 2, 2004, Decided

COUNSEL: For LAURA SUSAN REYNOLDS, Debtor (00-32707): CHRIS LENHART, DORSEY & WHITNEY LLP, MINNEAPOLIS, MN.

For LAURA SUSAN REYNOLDS, Plaintiff (01-3079): MONICA L CLARK, DORSEY & WHITNEY LLP, MINNEAPOLIS, MN.

For PHEAA, HEMAR INSURANCE CORP OF AMERICA, THE EDUCATION RESOURCES INSTITUTE, Defendants (01-3079): PHILIP R SCHENKENBERG, ST PAUL, MN.

For U S DEPARTMENT OF EDUCATION, Defendant (01-3079): ROYLENE ANN CHAMPEAUX, U S COURTHOUSE, MINNEAPOLIS, MN.

For WINDHAM PROFESSIONALS INC, Defendant (01-3079): ERIN W SHEEHAN, GENERAL COUNSEL WINDHAM PROF, SALEM, NH.

For EDUCATIONAL CREDIT MANAGEMENT CORP, Defendant (01-3079): CURTIS P ZAUN, ST PAUL, MN.

For LAURA SUSAN REYNOLDS, Counter-Defendant (01-3079): MONICA L CLARK, DORSEY & WHITNEY LLP, MINNEAPOLIS, MN.

JUDGES: GREGORY F. KISHEL, CHIEF UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: GREGORY F. KISHEL

OPINION:

MEMORANDUM DECISION

At St. Paul, Minnesota, this 2nd day of January, 2004.

This adversary proceeding for determination of dischargeability of debt under *11 U.S.C. § 523(a)(8)* came on before the Court for trial. The Plaintiff ("the Debtor") appeared by her attorneys, Jonathan A. Strauss, Monica L. Clark, and Jennifer M. Wangerien. Defendants. The Education Resource Institute ("TERI"), Pennsylvania Higher Education Assistance Agency ("PHEAA"), and HEMAR Insurance Corporation of America ("HEMAR") appeared by their attorney, Philip R. Schenkenberg. The United States Department of Education appeared by Roylene A. Champeaux, Assistant United States Attorney. Educational Credit Management Corporation ("ECMC") appeared by its attorney, Curtis P. Zaun. Upon the evidence received at trial and the arguments and memoranda of counsel, the Court memorializes the following decision.

PARTIES

The Debtor filed a voluntary petition under Chapter 7 on June 20, 2000. To finance her education at the University of Michigan Law School, the Debtor had taken out loans under various programs, including several guaranteed by the United States through its Department of Education. The loans are evidenced by eleven different promissory notes. The Debtor has not taken any action to consolidate these loans under any public or private program.

As a result of loan origination, or assignment subsequent to origination, the Defendants that

participated at trial presently hold the rights to payment under all of these promissory notes.

GOVERNING LAW

This adversary proceeding sounds under *11 U.S.C. § 523(a)(8)*. That statute creates an exception from discharge in bankruptcy "for an educational . . . loan made, insured or guaranteed by a governmental unit . . ." This exception from discharge is self-executing; it does not require a court adjudication to make it effective. H.R. REP. No. 595, 95th Cong. 1st Sess. 79 (1977). The Debtor, however, maintains that allowing this exception to lie would "impose an undue hardship on" her and her dependants, within the meaning of the later text of *§ 523(a)(8)*. Thus, she seeks a determination that all of her educational loan debts were dischargeable, and were in fact discharged, in her bankruptcy case. As the proponent of an exception to the exception from discharge, the Debtor has the burden to prove her entitlement to it. *In re Ford, 269 B.R. 673, 675 (B.A.P. 8th Cir. 2001)*; *In re Svoboda, 264 B.R. 190, 194 (B.A.P. 8th Cir. 2001)*; *McCormick v. Diversified Collection Servs. (In re McCormick), 259 B.R. 907, 909 (B.A.P. 8th Cir. 2001)*; *In re Cline, 248 B.R. 347, 351 (B.A.P. 8th Cir. 2000)*.

A determination of undue hardship under *§ 523(a)(8)* is an issue of law. *In re Long, 322 F.3d 549, 553 (8th Cir. 2003)*. In this Circuit, this issue requires an examination of the facts and circumstances that bear on the debtor's ability to make payment on account of the educational loans in question, and that otherwise go to the issue of hardship. *In re Long, 322 F.3d at 553*; *In re Andrews, 661 F.2d 702, 704 (8th Cir. 1981)*. The factors relevant to this inquiry include:

1. the debtor's past and present financial resources, and those the debtor can reasonably rely on for the future;

2. the reasonable necessary living expenses of the debtor and the debtor's dependents; and

3. "any other relevant facts and circumstances surrounding each particular bankruptcy case."

In re Long, 322 F.3d at 554; *In re Andrews, 661 F.2d at 704*. *See also Andresen v. Nebraska Student Loan Program, Inc. (In re Andresen), 232 B.R. 127, 132 (B.A.P. 8th Cir. 1999)* (cited with approval on this point in *Long, 322 F.3d at 554*). Where a debtor will have sufficient funds from income or other sources to cover ongoing payment on educationalloans, while maintaining a "minimal standard of living," the debtor has not proven undue hardship, "the debt should not be discharged." *In re Long, 322 F.3d at 554-555*.

FINDINGS OF FACT

The Debtor's Age and Family Status.

The Debtor is presently thirty-two years old. On July 3, 1999, she married John Turner. The Debtor has no children, by this marriage or otherwise. Her husband has three children by another relationship. All of his children are in their mid-teens in age. He pays child support for them via wage withholding. The Debtor and her husband reside in St. Paul, Minnesota, in a one-bedroom rented apartment.

The Debtor's Education, Professional Status, Employment Search, Employment History, and Household Income.

The Debtor is a graduate of Claremont McKenna College, Los Angeles County, California (B.A., *cum laude*, 1992) and the University of Michigan Law School (J.D., 1995). Her academic ranking in law school was "around the middle of the class." After graduating from law school, the Debtor took the Colorado bar exam. She passed it on her first attempt. She was admitted to the Colorado Bar in the fall of 1995. Her Colorado licensure is presently on an inactive status. She has not taken the bar exam, or sought admission to the bar by any other means, in any other state. She is not licensed to practice law in the State of Minnesota.

While she was in law school, the Debtor hoped to become a public defender after graduation, or to practice in some part of the juvenile justice/child protection system. During a job search in her third year in law school, she participated in an on-campus interview process. She sent out more than 400 resumes to law firms and other employers in Colorado, Minnesota, and Massachusetts. She also tried to make use of alumni ties. During her job search, however, she was granted only four interviews. She received no job offers.

During law school, the Debtor clerked for a county attorney's office, doing legal research and writing memoranda for attorneys on staff. Her only experience in the hands-on practice of law consisted of "about two hours" of services performed on a contract basis through a friend of her father, negotiating with vendors and drafting a contract. She did this work in the fall of 1995.

For about a year after graduating from law school, the Debtor continued to seek employment as an

attorney by sending letters and resumes to prospective employers. When her efforts in Colorado were not productive, the Debtor moved to Boston, Massachusetts, because friends of hers lived there. She tried to use University of Michigan alumni contacts in Boston, as well as friends from law school who had obtained jobs in law firms. She did not receive any job offers there.

Sometime in 1996, the Debtor stopped sending out written applications and making inquiries about employment as a practicing attorney. She had a "head hunter" employment consultant review her credentials and effort. After doing so, that person "couldn't figure out what [she] was doing wrong."

After the Debtor was unable to obtain employment as an attorney in Boston, she began to take clerical positions through temporary-employment agencies. She worked as a secretary or an assistant in the Space Management Department of Boston University, in the Executive Search Department of Fleet Bank, and in the sales and catering department of a local Holiday Inn for several months each. She was paid between $ 10.00 and $ 12.00 per hour on each of these jobs.

In August, 1997, the Debtor moved to the Twin Cities of Minnesota, again because she had friends living there. By then, the Debtor had "given up hope of working as an attorney." She again "started temping" as a secretary, at compensation of $ 12.00 per hour.

In October, 1999, the Debtor took a permanent position as an administrative assistant in the Communications Department of the St. Paul Foundation. Her starting annual salary was $ 29,000.00; it increased to $ 30,000.00 during the course of her

employment there. In this capacity, she worked on various reports and publications. The Debtor kept this employment until the spring of 2001, receiving positive and very positive periodic evaluations. She voluntarily left the St. Paul Foundation in the spring of 2001, without another employment offer or strong prospect. While working temporary clerical assignments for the next six to seven months, the Debtor applied without success for a position as a headnoter for West Group, the large legal publisher, and a clerical position in the communications office of the Minnesota Court of Appeals.

In November, 2001, the Debtor took the employment that she held as of the date of trial, as a secretary-receptionist with a local building contractor, Roof Spec Inc. She is compensated at the rate of about $ 15.00 per hour, or approximately $ 30,000.00 on an annualized basis; she testified to receiving approximately $ 1,700.00 in net earnings per month. She receives health insurance through her employment, paying a premium of $ 130.00 per paycheck. The Debtor stated that she had received some "negative feedback" on her performance, centering around her attitude and her speed in performing her duties, but she had retained this employment.

The Debtor's husband John Turner is employed by First Student Transportation as a school bus driver on a standby basis. He works between 15 and 30 hours per week on this job, is compensated at an hourly rate of $ 13.75, and is paid weekly. Turner had had a second job as a driver or delivery person for an entity called Laboratory Testing, working "three-quarter time" or (presumably) about 30 hours per week, but he had lost this employment shortly before trial. As of the date of

trial, he was looking for another part-time job in driving or delivery, and expected to get one at a comparable rate of compensation. During calendar year 2001, First Student Transportation paid Turner gross compensation of $ 29,000.00, disbursed during the nine months of the school year.[1]

Turner's net monthly income as of the date of trial, working around 32 hours per week, was approximately $ 1,300.00, after the withholding of his current child support obligation.[2] It was reasonably clear that this reflected a temporary reduction of income for him, and that it was within his power to reverse it by replacing the lost part-time driver job or by increasing his hours with First Student. Adjusted proportionately for a replacement of that income, the monthly net income to be deemed to him would total approximately $ 1,600.00.

On an annualized basis, with Turner employed so as to receive gross income of approximately $ 29,000.00 per year and the Debtor having her full-time employment with Roof Spec Inc., their total net household income is approximately $ 3,300.00 per month.

The Debtor's Medical and Psychological Condition.

The Debtor has received diagnoses of major depression, panic and anxiety disorder, borderline personality disorder, or all three, from a half-dozen different mental health professionals.

Her affliction with these mental illnesses is long-standing. While in junior high school, she experienced symptoms of suicidal ideation and fatigue, feelings of sadness, hopelessness and personal isolation, and "unexplained" physical ailments for a year. These symptoms recurred three times while she was in high

school. She received no psychiatric or psychological care for these episodes.

During her junior year in college, the Debtor had a "very bad panic episode" while traveling in Scotland during a "semester abroad" educational program. She was unable to cope with strong feelings of disorientation, was convinced that she could not communicate with or understand the local people, and was unable to manage her personal finances. Her parents quickly arranged for her return to the United States. She then consulted a psychiatrist for the first time, receiving a diagnosis of agoraphobia and depression, and went through counseling therapy. She missed a semester of college, making up the credits by summer course work. Upon returning to campus, she began experiencing symptoms of depression (suicidal thoughts, feelings of sadness and isolation) after the breakup of a relationship with a boyfriend. During classes, "three to four times a day," she had panic attacks (feelings of pressure and tightness in her chest, a sense of her emotions being out of control, "a roller coaster feeling").

During the second semester of the Debtor's first year in law school, "the truly bad depression started," with intense and morbid feelings of hopelessness "with [her] all the time." She frequently considered suicide, "praying to God for death." She also engaged in several forms of physically reckless behavior, including intentionally driving in a dangerous manner.

The Debtor did not seek medicalor psychological treatment while in law school. After graduating and moving to Colorado, she treated with the psychiatrist who had given her the original diagnosis of agoraphobia

and depression. She consulted and treated with various mental health professionals in Boston and then in Minneapolis/ St. Paul.[3] In Minnesota, she "saw" a medication manager and a therapist-social worker through the Ramsey County Social Services Department. After she received health insurance coverage as a benefit of employment, she started seeing a psychotherapist regularly.

Over the years, these medical professionals have prescribed a variety of anti-depressants, mood-stabilizing, and anti-psychotic medications for the Debtor. The drugs have included Zoloft, Ziprexa, Rispridol, and Serachrome. She is currently prescribed Tobimax for mood stabilization--to remedy panic attacks--and Effexor as an anti-depressant. For most of these medications, the Debtor either experienced unpleasant physical side effects, or required greatly increased dosages over time to achieve the same effect. She has had to take increasing dosages of her current medications since she started using them. The side-effects from her current medications include numbness in the extremities, drowsiness, distraction, and "unexplained itching." She also suffers from irritable bowel syndrome. The Debtor testified that Tobimax had "significantly reduced" the incidence of her panic attacks, and that she had not had an episode identifiable to agoraphobia since the original one in 1991. She also stated somewhat broadly that her "depression [was] getting worse now, as we go along."

Despite her regimen of therapy and medication over the several years preceding trial, the Debtor still experiences many of the symptoms of depression: feelings of hopelessness and resignation; lethargy to the point of sleeping up to sixteen hours per day; suicidal

and self-destructive ideation; occasional mild self-injury (cutting herself) "to relieve tension"; and neglect of personal hygiene, appearance and household responsibilities. She states that her personal financial situation, particularly her large educational loan burden, is a "major stressor."

At present, the Debtor is most properly diagnosed as suffering from a major depressive illness, manifested by episodes of moderately severe depression. This is categorized as a disthymic disorder--thatis, a persistent, consistent, chronic and longstanding condition. She also has comorbidity, in the form of accompanying anxiety and panic disorders, clearly triggered by stressful incidents or conditions that she perceives as stressful. Her current mix of medications can reduce her symptoms, but it does not do so consistently. This is a common characteristic of comorbidity. Increases in dosage have had some positive effect for the Debtor, but this appears to have leveled off for all medications thus far and her response to the maximum dosage "tends to wane." Ultimately, as her psychiatric expert witness reported, "no medication combination has resulted in a substantial sustained partial remission" of the symptoms of her mental illness.

The Effect of the Debtor's Psychological Condition on her Employability.

The effects of the Debtor's mental illness on her function in life are fairly characterized as tragic. On the one hand, she clearly is a person of substantial natural intelligence. This is recognized as such by the mental health professionals who have treated or evaluated her, and is evidenced by her achievement in the controlled

environment of academia. On the other hand, in a non-academic environment her conditions of depression and anxiety work, synergistically or individually, to deprive her of the ability to analyze problems and to make decisions and judgments for the benefit of third parties with the certainty and confidence that are required of an attorney and fiduciary. She is unable to consistently focus on more complex problems over an extended period of time.

As both the Debtor and her expert witness noted, her initial inability to pursue her chosen profession sapped her confidence, which then became a self-fulfilling prophecy. Lack of belief in herself holds her back from taking the sort of calculated risks that workplace advancement requires, and thus deprives her of the chance to prove herself. She is excessively critical of herself, and chronically irritable as a side-effect of her medications; she clearly perceives others' criticism of her as personal insult or attack. These traits and tendencies are consistent with her diagnoses of borderline personality disorder and depression. This emotional vulnerability, persisting and resistant to treatment, is a huge impediment to effective participation in the rough-and-tumble of the practice of law; there, personal ambition and aggression are overt and ubiquitous, reined in only by an attorney's voluntary compliance with complex and abstract principles of ethics and professionalism. In a more generalized way, the Debtor's tendency to overreact to stresses in the workplace is an equal impediment.

Beyond these functionally-related considerations, there is very little chance that the Debtor would be able to obtain admission to the Minnesota Bar, because it is quite unlikely that she would satisfy the Board of

Law Examiners as to her fitness to practice.[4] With her long-term history of mental illness, the Debtor would have to demonstrate that she had been asymptomatic of depression and anxiety for an extended period. Given the undisputed medical evidence in the record, there is simply no prospect that the Debtor could do this within the foreseeable future.[5]

The Debtor's Vocational Profile and Employment Prospects.

Given the severity and persistence of her mental illness, and the unlikelihood of her gaining a license, the Debtor is simply unable to be employed as a practicing attorney. She has recognized this herself, having concluded that she could not undertake the practice of law and maintain her ethical obligation to practice competently. Her treating psychotherapist agreed with this decision, and endorsed the Debtor's analysis of her own limitations. There is no indication in the record that she will ever gain enough psychological strength and equilibrium to enter the practice of law and continue in it.

The circumstances that prevent the Debtor from working as an attorney would also prevent her from working as a paralegal under the supervision of an attorney. The duties of that position are virtually as client-centered as those of a practicing attorney, and its demands and stresses are virtually indistinguishable in nature. The Debtor and the clients of her employer would be exposed to the same grave risks were she to work in a paraprofessional status. Finally, there is no realistic chance that the Debtor could obtain employment as a legal secretary, or that she could maintain an effective performance as one. During her

job search she had explored this option to some extent, but she gave up after the prospective employers repeatedly expressed unwillingness to consider a law school graduate for a clerical position.[6]

As a vocational matter, the Debtor simply cannot be employed in an administrative or clerical capacity at any level of responsibility greater than that of office manager or administrative assistant. Those positions would be an advancement from the position that she currently holds, and one unlikely in the near future given the involuntary and semi-involuntary limitations on her abilities to assume more responsibility over third parties. As a practical matter, for the indefinite future, she will remain at the level of employment, responsibility, and compensation that she has had since she took her first "permanent" position with the St. Paul Foundation. In addition, the manifestations of her persisting mental illnesses may make it difficult for her to retain any particular job for an extended period of time. A recurrence of severe depression or a lapse into the behavioral incidents of borderline personality disorder would likely impair her performance, so as to lead to voluntary or involuntary termination.[7]

The Debtor's Household Living Expenses.

With seasonally-varying categories of expense averaged over a full year, the Debtor estimated her current monthly household expenditures as follows:

Rent	$ 750.00
Utilities	
Electricity	$ 40.00
Telephone	$ 120.00
Clothing	$ 100.00

Food	$ 450.00
Transportation	
Car Payment	$ 175.00
Gasoline and Auto Maintenance and Repair	$ 280.00
Automobile Insurance	$ 130.00
Household and Personal	
Prescription Medications and Therapy	$ 130.00
Non-prescription Medications	$ 47.50
Personal Hygiene	$ 50.00
Recreation	$ 40.00
Laundry	$ 20.00
Newspapers	$ 15.00
Past-due Income Taxes	$ 50.00
TOTAL:	$ 2,397.50

The Debtor and her husband maintain two forms of telephone service, a "land line" at home and cellular-phone service. Under the terms of his custody and visitation arrangement, her husband is required to be accessible via cell phone at all times.[8] Under the circumstances, their expenditure for telephone service is not unreasonable.

The other budget entries described by the Debtor were entirely reasonable in nature and amount, for a household of the composition of hers, located in the Twin Cities metropolitan area. However, she did not include any allowance for unanticipated or emergency expenses that would be reasonably incurred. Examples might include larger medical expenses not covered by insurance due to deductibles, copays, or limitations on coverage; major automobile repairs that her husband

could not handle; or unusual expenses from her husband's visitation with his children. Given the variations of human experience over the longer term, it is not inappropriate to make allowance for a cushion for such "emergency" or "contingency" expenses--particularly for households of low or moderate income that are unlikely to be able to save money regularly. This must be done for the Debtor's case, given the limitations that most medical insurance plans put on coverage for psychiatric therapy. Various aspects of the Debtor's medical condition, personal makeup, and financial situation are so prone to generate such expenses, that a line-entry of $ 100.00 per month for such a "cushion" is entirely justified.

Finally, there is the matter of transportation. The Debtor and her husband clearly require two automobiles; their places of employment are separated and the public transportation system in the Twin Cities does not provide regular or frequent service to most of its extended metropolitan area. Obviously, they have made do with used cars of aged vintage, held together by her husband's maintenance.[9] Presently, they have the advantage of a low debt service obligation for the acquisition of the decade-old vehicles they drive, through the accommodation of a personal loan from the Debtor's brother. It is fatuous to think that they will always have that boon. Given the likelihood that they will have to replace old cars on a relatively frequent basis, it is more realistic to attribute a fairly constant future expense for vehicle acquisition of $ 250.00 per month--$ 75.00 more than their current obligation. As older automobiles do, the current ones have required some significant repairs since acquisition; that expense is incorporated into the Debtor's line-entry for

automobile "maintenance and repair," and the amount is reasonably related to the age of the vehicles and her actual experience.

With the total augmentation of $ 175.00 for these two items, the Debtor's household expenses, current and reasonably to be expected, total $ 2,572.50. One can defensibly round this up to $ 2,600.00, again to account for the vagaries of everyday life.

These exercises enable the bottom line: offsetting $ 2,600.00 in household expenses--a figure that is a bit more generous than the one the Debtor allowed herself--against the $ 3,300.00 of household income received in-hand, requires the deeming of an income surplus of $ 700.00.

The Debtor's Assets and Other Financial Resources.

The Debtor and her husband own two aged motor vehicles, just discussed: a 1992 Mercury Sable, with 80,000 miles, used by her, and a 1990 Dodge Silhouette, with 130,000 miles, used by him. As would be expected, the cash value of these vehicles is nominal.

Other than the vehicles, the Debtor and her husband own a modicum of personalty: the standard array of lower-value household goods and furniture; a modest wedding ring set; and two shares of stock in the Wal-Mart Corporation, owned by her husband. They have no other investments, retirement funds of any sort, or liquid assets other than their operating bank accounts. As of the date of trial, the Debtor had a balance in her checking account of about $ 700.00, a typical amount for her after the deposit of one paycheck but before the payment of any major household bills. The Debtor was unaware of the balance in her husband's checking account, but the record supports

the inference that it was certainly no larger than that in hers, and regularly drawn down like hers.

The Debtor's Educational Loan Debt Structure.

The Debtor's debt to the five Defendants participating at trial is evidenced by a series of 14 promissory notes, executed between July 14, 1992 and September 20, 1994.[10] As of mid-March, 2002, the Debtor's total outstanding educational loan indebtedness exceeded $ 142,044.55. Were each debt to each participating Defendant, in the amount outstanding as of mid-March, 2002, to be repaid by the Debtor at then-current interest rates over the respective terms of 10 and 20 years, the Debtor's monthly payment obligations would be as follows:

Noteholder	Over 10 Years	Over 20 Years
TERI	$ 605.00	$ 338.00
HEMAR	$ 110.50	$ 70.06
PHEAA	$ 463.09	$ 307.03
US DOE	$ 343.43	$ 227.72 [11]
ECMC	$ 119.02	$ 78.74
TOTALS:	$ 1,641.04	$ 1,021.55

The Debtor's obligations to PHEAA, ECMC, and US DOE are eligible for consolidation under the William D. Ford Direct Loan Program. The balances on these obligations totaled $ 87,523.39 as of mid-March, 2002. If one assumed that consolidated debt amount; an interest rate of 6.75%; an adjusted household gross

income of $ 51,924.79 for the Debtor; and a family size of three, for such a consolidation, the Debtor's initial monthly payment obligations under the Ford Program's four options would be as follows:

Standard (10-year repayment period)	$ 1,004.98
Extended (30-year repayment period)	$ 567.68
Graduated (30-year repayment period)	$ 502.49
Income-Contingent (until later of payment in full or 25 years)	$ 621.58

Payment History on the Debtor's Educational Loans.

The first payments on the Debtor's educational loans became due while she was in Boston. She made these payments for about six months, from her meager earnings at the time. She found that she was indirectly funding the payments by using credit card accounts, charging current living expenses to free up cash to pay on the loans. She could not sustain this, and defaulted on the loans.

This led to dunning calls and other collection activity against her. The educational lenders' collection agents refused her requests to renegotiate the payment terms to amounts more within her immediate means. After the Debtor moved to Minnesota in 1997 and found employment prospects no more lucrative there, she decided she had no hope of repaying the loans.

DISCUSSION

Under the statute, the issue is whether these facts and circumstances would impose an "undue hardship" on the Debtor and her dependents, were any or all of

her educational loan obligations excepted from discharge in bankruptcy. As noted earlier, this is a question of law. *In re Long, 322 F.3d at 553*.

Passing on questions of law requires the drawing of a line, the application of a standard enunciated in the law to a particular set of facts. Here the line is marked by the statutory modifier "undue."[12] The Eighth Circuit clearly expects the "undue" criterion to resonate with financial circumstances--specifically, the residual ability to make payment from current income once a baseline of reasonable but frugal household expenditure is established. *In re Long, 322 F.3d at 554-555*; *In re Andrews, 661 F.2d at 703*; *In re Andresen, 232 B.R. at 140*. However, the *Andrews/Long* formulation includes a catch-all for all other relevant facts--and those opinions' language does not limit them to financially-based ones. In *Andrews*, the Eighth Circuit recognized that a debtor's illness or disability was a relevant factor, particularly as it affected "ability to work" and the anticipated cost of medical care but not exclusively for those reasons. *661 F.2d at 704-705. See also In re Strand, 298 B.R. 367, 374-376 (Bankr. D. Minn. 2003)*; *In re Korhonen, 296 B.R. 492, 496 (Bankr. D. Minn. 2003)*. Though the choice and weighting of such non-pecuniary factors are ultimately subject to *de novo* review by an appellate forum, *Long, 322 F.3d at 553*, the trial court clearly may take them into consideration. Otherwise, the Eighth Circuit's repeated references to a broad "totality-of-the-circumstances approach to the 'undue hardship' inquiry," *In re Long, 322 F.3d at 554*, would be rendered nugatory.[13] *See also In re Andresen, 232 B.R. at 140*; *In re Strand, 298 B.R. at 376*.[14]

In carrying *Andrews* forward after two decades, *Long* establishes that the undue-hardship analysis is not "progressive" or sequential. This means that the articulated test does not proceed by stages; therefore, a debtor does not lose for a failure to meet a particular stage.[15] Ultimately, the trial court is to consider the whole mix, assigning appropriate weight individually to "the unique facts and circumstances that surround the particular bankruptcy," *322 F.3d at 554. See also In re Andresen, 232 B.R. at 136* (recognizing trial court's "judicial discretion within the confines of defining and determining undue hardship") and 140 (acknowledging that totality-of-circumstances test "ensures an appropriate, equitable balance [between] concern for cases involving extreme abuse and concern for the overall fresh start policy") (interior quotes omitted).

The framework, then, is a single and simultaneous consideration of this Debtor's whole picture. On the record presented, this is an extremely difficult call.

On the one hand, there is the patent fact of a very large educational loan burden, in a dollar-amount of many multiples of the value of the Debtor's meager assets. This debt structure appears to whelm her resources to generate income to service it. The Debtor identifies the debt's very existence as a major stressor to her, tipping the precarious balance of her mental health regimen. She has the support of psychiatric professionals in that conclusion.[16] Two things are utterly manifest: the centrality of the debt in the Debtor's daily attentions, and its clear portent as a badge of career failure to an intelligent person educated to be a high-level professional but struggling against an intractable mental illness. Call it another exemplar of self-fulfilling prophecy if one must, or even a self-

serving excuse in some unknowable part; however, the mere existence of this debt burden clearly is a significant block to the Debtor's recovery from mental illness. If this is not one of those "unique facts and circumstances" that play into the analysis under *Andrews* and *Long*, then nothing is. In an intangible but very real sense, it imposes a very significant hardship on the Debtor and her husband.

On the other hand, it was the Debtor's burden to make out the undue hardship she pleaded when she commenced this proceeding. *See* cases cited *supra* at p. 3. That requirement has been defined by the Eighth Circuit in an iteration that gives substantial weight to financial considerations. *Long* clearly envisions the simple dollars-and-cents circumstance of ability to pay as a crucial factor:

> 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.

322 F.3d at 554-555.

In the last instance, the Debtor did not establish, as a matter of fact, that she lacked all means to pay down all of the component loans in her educational debt structure. The hard financial evidence, even that which she proffered, does not bear out her conclusory protestation that she had no more than $ 100.00 per month in disposable household income.[17]

So this proceeding presents a debtor who has some repayment ability in fact, which could be applied to a portion of the referent debt.[18] However, she maintains with some credibility and some professional support that the looming of her educational loan obligations hampers her in coping with a deep mental illness, and that the sheer length of any of the proposed amortizations would impose undue hardship on her in that light.

In the last instance, it must be open to a trial court to consider the non-pecuniary effects of a debtor's very substantial student loan burden, in passing on the issue of undue hardship under *§ 523(a)(8)*. To deny that would neglect Andrews's specific inclusion of the third, catchall category of relevant circumstances. It would ignore *Long's* renewed endorsement of a broad, holistic, non-sequential, and less technical evaluation of a debtor's life, circumstances, and prospects, as they inter-relate with educational loan obligations. It would relinquish the judicial discretion to define and determine undue hardship that the *Andresen* panel expressly considered to be so important. Finally, it would overlook the plain language of the statute--something to be eschewed under most of the Supreme Court's bankruptcy jurisprudence for over a decade.[19] After all, had Congress intended the issue of educational-loan dischargeability to be governed exclusively by pecuniary factors, by the raw ability to pay something on a loan, it would have structured *§ 523(a)(8)* as it did *11 U.S.C. § 1325(b)*.[20]

The corollary is that it has to be open to the trial court to assign appropriate weight to non-pecuniary circumstances, and even to assign such factors greater weight than a potential ability to make payment. Otherwise, there would be no meaning to the *Andresen* panel's endorsement of an equitable balancing, a judicial flexibility to address all cases that fall between obvious debtor abuse of the discharge and utter penury, disability, and hopelessness. Of course, such weighting should be assigned only when an educational-loan balance is very substantial in relation to a debtor's net worth and annual gross income, where the standard and restructured amortizations would extend over a very long period, *and* where the presence and awareness of that great and ongoing liability have a demonstrated, detrimental impact on the debtor's physical or mental health. The priming of such considerations, a holding of undue hardship despite a demonstration of some ability to pay, should not be done or made lightly. It would be only in the rarest of cases that the override would lie, and relief given to such a debtor. Nonetheless, to give fullest effect to the "less restrictive approach" and the "fairness and equity" referenced in *Long, 322 F.3d at 554*, the option must be recognized as available.

Here, the Debtor has been most accurately diagnosed as suffering from "major depressive episode, recurrent, severe," "panic disorder with history of agoraphobia," and "personality disorder . . . with borderline, histrionic, and narcissistic features, including some evidence of dissociation under stress."[21] She has been professionally recognized as subject to "psychosocial stressors related to problems with," *inter alia*, "economic problems and problems related to the interaction with the legal system."[22] Her "notable

distress[] with regard to her financial obligations, previous bankruptcy experience, and the continuing struggle to remain solvent in the face of her experience of overwhelming indebtedness" was recognized on evaluation as a major stressor,[23] Her depression, panic attacks, and "brief suicidal thoughts and dissociative episodes" continued during the pendency of this litigation despite the fact that she was taking concerted action to try to cope with this problem.

The Debtor's expert witness did not give an opinion as to whether a lifting of that burden would significantly lessen the stress of daily life for which the Debtor lacks normal coping mechanisms. Neither did he opine as to whether the Debtor's recovery from mental illness would be promoted or hastened by that.[24]

Nonetheless, the inference is utterly clear: relief from a verylarge long-term debt, otherwise nondischargeable in bankruptcy, would take a very significant stressor out of the Debtor's life and consciousness. The worry over repaying it, and her dread of the consequences of being sued, would be gone. Perhaps more importantly, so would one gnawing reminder of her frustrated hope to be a productive member of a respected profession. It is a matter of inference, but one that has ample support in the record: the extraction of her educational-loan liability from her financial picture would lessen her overall stress level, mitigate her distractability, and significantly reduce the chances of recurring depression and decompensation. At the very least, the Debtor would be deprived of one major, seemingly irresolvable excuse for not tending more zealously to her psychological recovery, through therapy and by responsibly confronting other stressors more within her grasp.[25] On the other hand, there is

really no doubt that preserving the Debtor's liability for even a portion of her educational loan burden would impose a hardship on her. It would perpetuate a recognizable and significant impediment to her psychological recovery.

And, as it must be said, under the totality of her circumstances the hardship would be "undue." This is a suffering human being, imperfect as all of us are, shackled by a fund amental sense of personal failure and reminded of that every day. She may not have always made the most well-informed choices of employment; she probably has not always performed with optimal effectiveness in the jobs she took. Nor, earlier, did she take the most directed and energetic actions in trying to parlay her educational credentials into a life in the law. Not a one of us can truthfully claim to have done all of those things without fail, throughout life and particularly in early adulthood. The Debtor is now more fully aware of the deep limitations that her psychological makeup puts on her career development, and she now is much more honest about them. She has consistently made an effort to be self-supporting, admittedly at a much lower level, but one with results consistent with her limitations.[26] Her fairly tenuous grasp on these reduced expectations could fail, were the stressor of continuing liability on her educational loan burden, or even a portion of it, to continue. This danger is what makes the hardship of a continuing exception from discharge "undue."

As noted earlier, subordinating financial circumstances to non-pecuniary ones under the *Andrews* test should be reserved only for the extraordinary case, one where the potential of non-pecuniary hardship is manifest, palpable, and of great

magnitude. This is one such. Nondischargeability poses such negative consequences to the Debtor's mental health recovery, that they outweigh her current ability to make payment on at least a portion of her educational loan obligations. Bankruptcy has always been a refuge from unwise decision-making in financial matters, and from the financial results of unforeseen disaster in personal affairs. It should, and will, function as such for the Debtor here. *Cf. In re Strand, 298 B.R. at 377*; *In re Korhonen, 296 B.R. at 497*.

Order for Judgment

On the memorandum of decision thus made,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Excepting the Debtor's obligations to Defendants HEMAR, PHEAA, U.S. DOE, ECMC, and TERI from discharge in BKY 00-32707 would impose an undue hardship on her and her dependents.

2. Accordingly, the Debtor's obligations to the Defendants identified in Term 1 were discharged in the due course of BKY 00-32707.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

GREGORY F. KISHEL

CHIEF UNITED STATES BANKRUPTCY JUDGE

Footnotes

n1 If Turner's contemporaneous hourly rate of pay was $ 13.75, this would mean that he had worked a bit over 40 hours per week for the full 52 weeks of the year. He had testified both to not working for First Student Transportation during the summer months, and to taking substantial overtime when it was offered. Regardless of how these impacted on the circumstances of his actual work attendance, it is clear that First Student Transportation had reduced his hours to some degree between sometime in 2001 and the date of trial; the most recent weekly paycheck stub in evidence showed 33 hours worked that week.

n2 This was calculated by taking the $ 302.71 in weekly net earnings evidenced by the paycheck stub in evidence and applying a multiplier of 4.3. Though the Debtor and her counsel evidenced some confusion as to whether this was net of child support payments, the stub includes line-entries for two different withholdings for family support obligations. On a mensualized basis, the amount is consistent with other evidence going to Turner's obligation.

n3 It is not clear from the record, but it appears that the frequency and extent of this involvement depended upon the availability of insurance coverage for its cost.

n4 Under Rule 5 of the Minnesota Rules for Admission to the Bar, an applicant must satisfy the Board as to "character and fitness" to practice law, including the possession of such "essential" abilities as the ones "to reason, recall complex factual information and integrate that information with complex legal theories," to "communicate...with a high degree of organization and clarity," "to act diligently and reliably in fulfilling one's

obligations," and "to comply with deadlines and time constraints..." No party to this proceeding made the Debtor's "character" an issue, in the sense of her honesty or personal integrity. However, it is undisputed that the Board is quite concerned about applicants' psychological fitness to handle the great stresses and emotional uncertainties of practice in a client-centered environment.

n5 To make out her case that she could not get the licensure necessary to practice law in Minnesota, the Debtor presented the testimony of Edward F. Kautzer, Esq. Kautzer qualified himself as an expert on the issue through his extensive practice in the defense of disciplinary complaints before the Minnesota Board of Lawyers' Professional Responsibility, and in representing applicants for admission to the Minnesota bar before the Board of Law Examiners after they had been questioned or refused on character-and-fitness grounds. He very credibly opined that it would be "highly unlikely" that the Debtor would be admitted to the Minnesota bar at present, and that she would have to show a very long-term remission of her mental illness before she could be. Among other things, he stated that in terms of result the psychologically-related fitness considerations would be applied more stringently to an applicant for admission who showed the Debtor's profile than they would be to a Minnesota-licensed attorney who had developed it but was evidencing success in coping with it. The distinction, he noted, was between the privilege of being admitted and the vested right of being licensed already. None of the Defendants produced expert testimony to rebut Kautzer's, and their counsel's cross-examination did not materially impair its probity or weight.

n6 The Debtor surmised that they were concerned that a secretary with training equivalent to a lawyer's would inevitably second-guess the work results of the attorneys with whom the secretary worked, or otherwise interfere in the attorneys' performance of professional functions. This conclusion as to the existence and nature of prospective employers' concerns is not unreasonable, whatever merit the employers' concerns would have in actuality.

n7 The findings on these fact issues are both direct and by way of inference, as are the observations in the "Discussion" section of this decision. They are made on a thorough review of expert testimony presented by both sides. Both witnesses were practitioners and academics in the field of clinical psychiatry; both qualified as experts on the effects of mental illness on the performance of job-related tasks in the setting of professional and business offices. The Debtor presented the "live" testimony of Robert B. Jones, M.D. The issue posed to Dr. Jones was on-point to this proceeding: whether a person of the Debtor's current psychological profile and psychiatric diagnosis could successfully perform as a practicing attorney, a paralegal, or a legal secretary or other office support person in a client-centered practice of law, in a way to both meet client needs and promote her own mental health. He gave lengthy, detailed, precise, and comprehensible testimony on the nature and effects of the mental illnesses he diagnosed in the Debtor, and the ways in which they manifested in her. He demonstrated an understanding of the psychological demands of serving legal clients. His opinion was that the Debtor simply could not be expected to undergo the frequent stresses experienced by legal professionals who are in "a

privileged relationship with a client," without very soon jeopardizing the equilibrium of her own mental health. The only responsible inference is that this could immediately jeopardize the innocent client. Dr. Jones's diagnosis and opinion were well-supported; they were spontaneously delivered, and resistant to challenge on cross-examination. They certainly preponderated over those given by the Defendants' expert, Thomas G. Gratzer, M.D. Dr. Gratzer's testimony was submitted via videotaped deposition and written transcript. His diagnosis was similar to Dr. Jones's in its overall points; it differed largely in emphasis, by attaching primary significance to a "personality disorder with borderline features" rather than depression, and by describing her "major depressive disorder" as being in "near full remission." Ultimately, however, the issue put to him was not the one at bar. He spoke to whether the Debtor's mental illness rendered her "disabled," in the sense of not being able to work at all and seemingly in the legal sense applicable to the Social Security Disability program or to a claim under a private policy of disability insurance. He opined that the Debtor was not "disabled," but that was not really the point. The Debtor has never gainsaid that she can work at *some sorts* of jobs, and she has done so. Beyond that, his statement that there was "no reason why she should avoid any particular job" was curt, conclusory, and unelaborated. In light of the undeniable limitations attendant to the Debtor's diagnosed conditions and actively and currently manifested by her, this was simplistic and inaccurate. On balance between the two, Dr. Jones's observations and opinion were by far the more credible. They fully supported the findings made here.

n8 The reason for this requirement is obscure, but there is no evidence to challenge its existence.

n9 Turner refurbished both on purchase, and does the regular maintenance; he brings major repair work to professionals.

n10 The parties stipulated in writing to the dates of each such note, the identities of the first obligee and subsequent assignee(s), the amount of the loan recited on each note, the amount of the balance of principal and interest outstanding on each as of stated dates in 2002, and an ongoing interest accrual. These stipulated facts are incorporated by reference into this decision; it is not necessary to formally reprise the data.

n11 This assumes an even amortization. If repayment were on a graduated schedule under US DOE's program, the payment amount would start at $ 171.72 and go up to $ 340.53.

n12 Whatever the test used under *§ 523(a)(8)*, the courts generally acknowledge that the circumstances of most debtors in bankruptcy would entail some hardship with the survival of a debt obligation past discharge--but only a hardship that is "undue" will permit relief under *§ 523(a)(8)*. An early and oft-quoted observation is:

> ". . . mere financial adversity without more will not do . . . the point is that Congress meant the extinguishment of student loans to be an available remedy to those severely disadvantaged economically as a result of unique factors which are so much a part of the [debtor's] life, present and in the foreseeable future, that the

> expectation of repayment is virtually non-existent unless by the effort the [debtor] strips himself of all that makes life worth living."

In re Briscoe, 16 Bankr. 128, 131 (Bankr. S.D.N.Y. 1981), quoting from *In re Kohn, 5 B.C.D. 419, 424 (Bankr. S.D.N.Y. 1979)*.

n13 There is an unresolved tension between this consideration, which *Long* undeniably injects into the process of decision, and *Long's* observation that where a debtor can "cover payment of the student loan debt--while still allowing for a minimal standard of living--then the debt *should* not be discharged..." *322 F.3d at 554-555* (emphasis added). That tension has to be resolved by two aspects of *Long's* text. First, the highlighted verb is "should" rather than "must," precatory rather than mandatory. Second, the Circuit observed that its would be a "less restrictive approach," *322 F.3d at 555*. Ultimately, this conundrum must be resolved by an appellate forum, most appropriately the Eighth Circuit itself.

n14 One thing that is utterly clear in the wake of *Long* is that the trial courts in the Eighth Circuit have no business applying any test formulated under *§ 523(a)(8)* other than the wide-ranging inquiry of *Andrews*. Thus, the structure of argument that both sides presented in this matter was to some extent ill-put, based as it was on an analysis eschewed by the Eighth Circuit in *Long, 322 F.3d at 555*. The ill-placement is not attributable to counsel, though. In citing such decisions as *In re Frech, 62 B.R. 235 (Bankr. D. Minn. 1986)*, *Shoberg v. Minn. Higher Educ. Coordinating Council, 41 B.R. 684 (Bankr. D. Minn.*

1984), and *Cossette v. Higher Educ. Ass't Foundation, 41 B.R. 689 (Bankr. D. Minn. 1984)*, counsel were just doing what comes naturally to advocates, trying to conform their arguments to the expressed predilections of the presiding judge. The ill-placement is attributable to that judge, the author of those decisions, who was not explicitly "acknowledging and following the controlling *Andrews* standard," *322 F.3d at 555*. *Frech, Shoberg*, and *Cossette* are simply no longer viable as support for argument in a proceeding under *§ 523(a)(8)*.

n15 The test applied in *Shoberg, Cossette*, and *Frech* was the one first framed in *In re Johnson, 1979 U.S. Dist. LEXIS 11428, 5 B.C.D. 532 (Bankr. E.D. Pa. 1979)*; it was to be applied sequentially. *Cossette, 41 B.R. at 691*; *Frech, 62 B.R. at 240-242*.

n16 At trial, Dr. Jones testified that the Debtor clearly "experiences [her] indebtedness as a stress," and that the substantial burden of her educational-loan indebtedness causes a sense of hopelessness and a feeling of being overwhelmed. This, in turn, causes her to experience the more significant symptoms of clinical depression.

n17 As noted above, at p. 7, there seems to have been a fundamental flaw in one aspect of the Debtor's theory of this litigation: the way and extent to which her husband's child support obligation was to be factored into her household fisc. The confusion on this ultimately is settled by his paycheck stub: his wages, as actually received, are net of this obligation, because monies are withheld to meet it as it accrues. Thus, the amount of the obligation may not be considered as a deduct on the

household expenditure side. The amount in question--about $ 370.00 per month--does not quite make the difference between the income-surplus as found here and the lesser amount asserted by the Debtor. However, it is the majority of it.

n18 For the ultimate holding on dischargeability, the repayment ability would be compared to the amortization of the individual debts owing to the Defendants, and those matching in total amount to the surplus income would be excepted from discharge. *In re Andresen, 232 B.R. at 137* (where debtor has not consolidated multiple educational loans, the "application of *§ 523(a)(8)* to each of . . . [the] loans separately [is] not only allowed, it [is] required . . .").

n19 *E.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 147 L. Ed. 2d 1, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000)*; *Rake v. Wade, 508 U.S. 464, 472-473, 113 S.Ct. 2187, 2192-2193, 124 L. Ed. 2d 424 (1993)*, *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 387, 113 S. Ct. 1489, 1494, 123 L. Ed. 2d 74 (1993)*; *Patterson v. Shumate, 504 U.S. 753, 758, 112 S. Ct. 2242, 2246-2247, 119 L. Ed. 2d 519 (1992)*; *Taylor v. Freeland & Kronz, 503 U.S. 638, 642, 112 S.Ct. 1644, 1647-1648, 118 L. Ed. 2d 280 (1992)*; *Barnhill v. Johnson, 503 U.S. 393, 395-400, 112 S. Ct. 1386, 1388-1391, 118 L. Ed. 2d 39 (1992)*; *United States v. Nordic Village, 503 U.S. 30, 32-37, 112 S. Ct. 1001, 117 L. Ed. 2d 181 (1992)*; *Union Bank v. Wolas, 502 U.S. 151, 160-162, 112 S.Ct. 527, 533, 116 L. Ed. 2d 514 (1992)*; *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 38, 112 S.Ct. 459, 463, 116 L. Ed. 2d 358 (1991)*; *Toibb v. Radloff, 501 U.S. 157, 160-161, 111 S.Ct. 2197, 2199-2200, 115 L. Ed. 2d 145 (1991)*;

Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101-102, 109 S. Ct. 2818, 2822-2823, 106 L. Ed. 2d 76 (1989) (plurallty opinion); *United States v. Ron Pair Enters., 489 U.S. 235, 241, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989)*; *Contra, BFP v. Resolution Trust Corp., 512 U.S. 1247, 114 S.Ct. 2771, 129 L. Ed. 2d 884 (1994)*; *Dewsnup V. Timm, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)*.

n20 One of the well-known federal canons of statutory construction is that a failure by Congress to include particular language in one provision of a statute is to be presumed intentional, when it has used the same language elsewhere in the same statute. *Bildisco v. Bildisco, 465 U.S. 513, 522-523, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1983)*. In *§ § 1325(b)(1)*-(2), Congress made confirmation of a Chapter 13 plan dependent on a debtor's commitment of "all of the debtor's projected disposable income" over a three-year period, with "disposable income" defined through the very same household-income-and-expenses considerations of the first two *Andrews* factors.

n21 Functional Disabilities Evaluation by Robert B. Jones, M.D., at 9-10 (in evidence as Plaintiff's Exhibit 1) ("Jones Evaluation").

n22 Jones Evaluation at 10.

n23 Jones Evaluation at 3.

n24 The reason is self-evident from the text of his report: that is not what he was engaged to do. His task was to evaluate whether the Debtor was capable of working as a practicing attorney, or in some other

capacity within a client-centered practice of law, and that is what he did.

n25 These include marital conflict and difficulties with extended family, both recognized by Dr. Jones and her several treating mental health professionals.

n26 As the Bankruptcy Appellate Panel has noted, the very first educational-loan nondischargeability statute was apparently prompted by "incendiary" but "isolated" and anecdotal accounts of "students discharging their educational obligations on the eve of lucrative careers" in business and the professions. *In re Johnson, 218 B.R. 449, 451 (B.A.P. 8th Cir. 1998)*. The debtor at bar may nominally possess a professional credential, but her prospects are far, far removed from those recited in such apocryphal legislative evidence.

No. 04-3192, No. 04-3722
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re: Laura Susan Reynolds, Debtor, Laura Susan Reynolds,
Plaintiff - Appellee,

v.

Pennsylvania Higher Education Assistance Agency; Defendant - Appellant, The Education Resource Institute; Hemar Insurance Corporation of America; Defendants, Educational Credit Management Corporation, Defendant - Appellant.
In re: Laura Susan Reynolds, Debtor, Laura Susan Reynolds,
Plaintiff - Appellee,

v.

Pennsylvania Higher Education Assistance Agency; The Education Resource Institute; Hemar Insurance Corporation of America; Educational Credit Management Corporation; Defendants, U.S. Department of Education,
Defendant - Appellant.

January 26, 2006 , Decided

COUNSEL: For Laura Susan Reynolds, Plantiff - Appellee; Andrew Robert Toftey, Monica L. Clark, DORSEY & WHITNEY, Minneapolis, MN. Jonathan A Strauss, FLYNN & GASKINS, Minneapolis, MN.

For Pennsylvania Higher Education Assistance Agency, Defendant - Appellant; Phillip R. Schenkenberg, Micheal David Gordon, Minneapolis, MN.

OPINION:

Order Denying Petition for Rehearing and for Rehearing En Banc

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Chief Judge Loken, Judge Riley, Judge Colloton, Judge Gruender and Judge Benton would grant the petitions for rehearing en banc.

January 26, 2006