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The Discharge Ability of Educational Loans as an Undue Hardship Pursuant to the United States Bankruptcy Code: Legislative History of 11USC § 523 (A) (8) and Analysis of Interpretive Sixth Circuit Precedent

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The Discharge Ability of Educational Loans as an Undue Hardship Pursuant to the United States Bankruptcy Code: Legislative History of 11USC § 523 (A) (8) and Analysis of Interpretive Sixth Circuit Precedent

Abstract
As costs of post-secondary education have risen and funding has decreased, institutions of higher education have come to rely on educational loans to maintain their enrollment levels and programs. 1 Indeed, these institutions have become dependent upon federally financed educational loan programs for their economic well being.2 Although the guaranteed loans are made by private lenders, the federal government assumes liability if a student borrower dies, defaults, or seeks bankruptcy relief. 3 Because the federal government guarantees repayment of these loans, their dischargeability in bankruptcy proceedings affects all taxpayers. This paper offers an historical overview of the social milieu giving rise to the general nondischargeability of educational loans in bankruptcy proceedings, sets forth a brief legislative history of the section containing the general nondischargeability provision, and provides an analysis of Sixth Circuit Court of Appeals precedent interpreting the general nondischargeability provision.4

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THE DISCHARGEABILITY OF EDUCATIONAL LOANS AS AN "UNDUE HARDSHIP" PURSUANT TO THE UNITED STATES BANKRUPTCY CODE: LEGISLATIVE HISTORY OF 11 USC § 523(A)(8) AND ANALYSIS OF INTERPRETIVE SIXTH CIRCUIT PRECEDENT

By

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I. Introduction

As costs of post-secondary education have risen and funding has decreased, institutions of higher education have come to rely on educational loans to maintain their enrollment levels and programs.[1] Indeed, these institutions have become dependent upon federally financed educational loan programs for their economic well being.[2] Although the guaranteed loans are made by private lenders, the federal government assumes liability if a student borrower dies, defaults, or seeks bankruptcy relief.[3] Because the federal government guarantees repayment of these loans, their dischargeability in bankruptcy proceedings affects all taxpayers. This paper offers an historical overview of the social milieu giving rise to the general nondischargeability of educational loans in bankruptcy proceedings, sets forth a brief legislative history of the section containing the general nondischargeability provision, and provides an analysis of Sixth Circuit Court of Appeals precedent interpreting the general nondischargeability provision.[4]

II. Overview

A. Bankruptcy Laws

The United States Constitution vests Congress with the authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[5] In 1898, Congress exercised this authority by enacting the Bankruptcy Act. Although suffering several substantial amendments to the original enactment, the purpose of the Bankruptcy Act was and remains to "give[] to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."[6] The Bankruptcy Act in its present form is codified as 11 USC §101, *et seq.*

B. Guaranteed Educational Loan Programs

During the twentieth century, a plexus of congressional enactments and administrative regulations created several educational incentive programs whereby students seeking to pursue post-secondary education could avail themselves of public and private funds to achieve those ends. These programs have been administered in a variety of forms, including but not limited to:

- Federal Work Study and institutional (non-subsidized) work study programs
- Pell Grants and Supplemental Grants ('SEOGs"), which are awarded to low-income undergraduate students based on their income and/or the income of their parents
- Low-interest loans for students available through the Federal Direct Student Loan ("FDL") Program and the Federal Family Education Loan ("FFEL") Program
- Stafford Loans and low-interest Perkins loans, available to students with exceptional financial need under the Federal Perkins Loan Program
- Parent ("PLUS") Loans, available through the FDL and FFEL programs
- Financial aid for health care students, such as Health Education Assistance Loans ("HEAL") and National Health Service Corps ("NHSC")[7]

The lynchpin of these private loan programs consists of a guarantee arrangement by which private lenders extend loans to students for post-secondary education purposes, with a guarantee from the federal government that such loans will be repaid in the event of a borrower's death, default, or insolvency. The federal government pays accruing interest on subsidized loans while the student-debtor attends college or graduate school; however, the debtor pays interest on unsubsidized loans which accrues while the debtor attends school.[8]

III. History of Bankruptcy Laws vis-à-vis Education Loan Programs

The Bankruptcy Act did not at first concern itself with the dischargeability of student loans. In 1970, however, Congress formed the Commission on the Bankruptcy Laws (the "1970 Commission"), consisting of a panel of jurists and scholars to reform the bankruptcy laws.[9] At that time, stories in the media recounted how individuals sought bankruptcy relief

to discharge student loans despite their prospects for substantial future income.[10] "Concerned that the perception of abuse, however small in reality, would "discredit the system and cause disrespect for the law and those charged with its administration,"[11] the 1970 Commission presented a model bankruptcy code to Congress in 1973, which contained a section barring student loans from discharge except in cases that would result in undue hardship.[12] The 1970 Commission expressly acknowledged that very few student loans were discharged in bankruptcy, citing an Office of Education study that had concluded that the bankruptcy rate in the guaranteed student loan program was less than one-quarter of one-percent of all payable loans.[13] While recognizing that "student loan abuse was more perception than reality,"[14] the 1970 Commission nevertheless believed that the few cases which involved abusive student loan debtors posed a threat to the continuation of the student loan program by blemishing its image.[15] Realizing that a drastic overhaul might prove too burdensome for debtors in serious trouble, the 1970 Commission recommended an exception to across-the-board nondischargeability: If the debtor could show that the student loans caused undue hardship for the debtor and his dependents, those loans could be discharged.[16]

Despite the 1970 Commission's position, student loans remained presumptively dischargeable until 1976[17] when Congress became concerned with a perceived high default rate on guaranteed student loans. Although a 1976 General Accounting Office study reported that less than one-percent of all matured educational loans were discharged in bankruptcy, articles appeared in the press which created the impression that students habitually received discharges of their loans.[18] Thus, in the 1976 Education Act Amendments,[19] Congress provided:

> A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only

> if such discharge is granted after the five-year period (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released only if the court in which the proceeding is pending determines that payment from future income or other wealth will not impose an undue hardship on the debtor or his dependents.

See, 20 USC 1087-3 (1976).

Although the empirical evidence had indicated that the amount of money lost due to student bankruptcy filings represented a very small percentage of the total outstanding loans, Congress cited the perceived growing trend toward increased student loan bankruptcy filings as the reason for the 1976 Education Act Amendments.[20]

After the enactment of the 1976 Education Act Amendments, stories in the media continued to tell of students discharging substantial student loan debt in bankruptcy while on the brink of lucrative professional careers. Thus, in 1978 Congress acted once again and codified the 1970 Commission's suggestion for a nondischargeability provision as section 523(a)(8) of the 1978 Bankruptcy Reform Act.[21] As originally enacted on November 6, 1978, section 523(a)(8) read:

> (a) A discharge . . . does not discharge an individual debtor from any debt–
>
> * * * *
>
> (8) for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a non-profit institution of higher education, unless–
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

11 USC §523(a)(8) (1975).[22]

Section 523(a)(8) represented a compromise between the House bill and the Senate amendment regarding educational loans. Namely, it provided broader protection to creditors under then-existing law, which was limited to federally insured loans, but applied only to educational loans owing to a governmental unit or a nonprofit institution of higher education.[23] By the plain language of this statute, a debtor could discharge student loans even absent undue hardship if the loans had become due at least five years before filing for bankruptcy relief. However, as further provided by section 523(a)(8), the five-year period was tolled if the debtor requested a deferral of repayment.[24]

In 1990, Pub L 101-647, §3621(1) amended section 523(a)(8) to increase the five year nondischargeability period to seven years:

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

11 USC § 523(a)(8) (1990).[25]

Pursuant to the plain language of the statute, a debtor could now discharge student loans absent undue hardship if the loans had become due at least seven years before filing for bankruptcy relief. As before, the seven-year period was tolled if the debtor requested a deferral of repayment.[26]

Four years later, the Bankruptcy Reform Act of 1994[27] created the National Bankruptcy Review Commission (the "1994 Commission") and charged it with the responsibility to prepare a report on issues in the Bankruptcy Code for submission to the President, Congress, and the Chief Justice. On October 20, 1997, the 1994 Commission submitted its final report, which acknowledged that "empirical evidence does not support the oft-cited allegation that changes in bankruptcy law entitlements -- exemptions, dischargeability, or otherwise -- affect the rate of filing for bankruptcy to obtain those benefits."[28] The report further pointed out that the undue hardship exception "is narrowly construed such that the debtors most in need are least likely to be able to litigate the issue convincingly or at all."[29] Citing Arthur Ryman, Contract Obligation: A Discussion of Morality, Bankruptcy, and Student Debt[30] and Margaret Howard, A Theory of Discharge in Consumer Bankruptcy,[31] the 1994 Commission acknowledged the irony that "Congress placed guaranteed loans in a class with debts for taxes, debts induced by fraud, and debts for compensation of injuries by drunk drivers,"[32] such that Congress' enactment of section 523(a)(8) treated guaranteed educational loans "as more obligatory than other loans, defining them to be as compelling as debts arising from turpitude."[33] The report further acknowledged that the guaranteed educational loan system had been "exploited by proprietary schools, colleges, and universities, as well as by bankers and other lenders, through contracts of adhesion that most students must accept lest they give up the idea of learning."[34] Thus, the report concluded that section 523(a)(8) should be repealed because "[t]he bankruptcy system, through its network of exceptions to discharge, seems to penalize individuals who seek to educate and improve themselves while it liberates other individuals from overwhelming debt incurred for other purposes or through different means."[35] The

1994 Commission believed that repealing section 523(a)(8) would put an end to litigation over the undue hardship exception "so that the discharge of student loans no longer would be denied to those who need it most."[36]

Notwithstanding the 1994 Commission's recommendation that section 523(a)(8) be repealed, on October 7, 1998, section 523(a)(8)(A) was amended to eliminate the seven-year dischargeability provision and to establish student loans as generally nondischargeable in the absence of undue hardship.[37] Section 523(a)(8) has not been amended since the 1998 repealer, and in its current form reads:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> * * * *
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents

11 USC §523(a)(8) (2005).

Three issues have predominated the litigation involving section 523(a)(8), namely: What is an educational benefit, what institutions are covered, and what constitutes undue hardship. This paper focuses on the latter issue, namely, what constitutes undue hardship for purposes of discharging an educational loan under section 523(a)(8) of the Bankruptcy Code.

IV. Undue Hardship: Analysis of Sixth Circuit Precedent

A. Procedural Matters

Section 523(a)(8) is self-executing.[38] Thus, pursuant to Bankruptcy Rules 4007 and 7001(6) an action to determine dischargeability of a debt must be brought as an adversary

proceeding[39] in which the debtor has the burden of proving that repayment of the educational loans would impose an "undue hardship" under section 523(a)(8).[40] When many of the relevant facts, particularly those pertaining to the debtor's employment and income, are stipulated by the parties, an adversary proceeding is unnecessary, and the issue of undue hardship and dischargeability may be determined by way of a dispositive motion.[41]

Federal Rules of Civil Procedure, Rule 52, is applicable to adversary proceedings by virtue of Federal Rule of Bankruptcy Procedure 7052.[42] Rule 52(a) requires a bankruptcy court hearing an adversary proceeding to make findings of fact and conclusions of law. It is not necessary for the judge to prepare elaborate findings on every possible issue raised at trial; however, "there must be findings, in such detail and exactness as the nature of the case permits, of subsidiary facts on which an ultimate conclusion can rationally be predicated."[43] "The findings should be explicit so as to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the grounds on which the trial court reached its decision."[44]

Before finding undue hardship and discharging an educational loan, a court *must* consider the factors articulated by the Sixth Circuit as relevant when determining undue hardship, else its decision will be reversed on appeal.[45] A determination that an educational loan poses an undue hardship under section 523(a)(8) is a mixed question of law and fact.[46] A lower court's conclusions of law are subject to *de novo* review, *i.e.*, a reviewing court decides the issue as if it had not been heard before with no deference being given to the trial court's conclusions of law.[47] A lower court's findings of fact are reviewed under the clearly erroneous standard, *i.e.*, a reviewing court determines whether it is "left with the definite and firm conviction that a mistake has been committed."[48]

B. The "Undue Hardship" Standard

A court may not discharge an educational loan unless a debtor satisfies the undue hardship standard set forth in section 523(a)(8) to discharge an educational loan.[49] What constitutes undue hardship for purposes of section 523(a)(8) has been one of the most widely litigated issues. The undue hardship exception has proved difficult to apply because Congress did not see fit to define the term in its various enactments, leaving the determination to be made by the bankruptcy courts on a case-by-case basis after considering a debtor's circumstances. In an effort to construe this provision, bankruptcy courts drew upon the legislative history of section 523(a)(8)[50] and "compensated for lack of a definition by devising tests to measure undue hardship."[51] Three such tests quickly shaped the nascent judicial landscape: Pennsylvania Higher Education Assistance Authority v Johnson (In re Johnson),[52] Bryant v Pennsylvania Higher Education Assistance Agency (In re Bryant),[53] and Brunner v New York State Higher Education Services Corporation.[54]

For many years, the Sixth Circuit declined to adopt any one test, but it frequently looked for guidance from the test enunciated by the Second Circuit Court of Appeals in Brunner v New York State Higher Education Services Corporation,[55] commonly known as the "Brunner test." On February 3, 2005, however, the Court expressly adopted the Brunner test as the test to be applied in the Sixth Circuit when determining whether educational loan debt presents an undue hardship on a debtor.[56] This test requires a court to determine that: 1) based on current income and expenses, the debtor cannot maintain a minimal standard of living for himself and his dependents if forced to repay the loans, 2) 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) the debtor has made good faith efforts to repay the loans.[57]

C. Inability to Maintain Minimal Standard of Living

The first prong of the Brunner test requires a court to determine whether, based on current income and expenses, a debtor cannot maintain a minimal standard of living for himself and his dependents if forced to repay the loans.[58] "Where a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalanced, a hardship exists from which a debtor may be discharged of his student loan obligations."[59] Under this prong, a "bankruptcy court must ascertain what amount is minimally necessary to ensure that the dependents' needs for care, including food, shelter, clothing, and medical treatment are met."[60] When assessing a debtor's finances for purposes of discharging educational loans, the Sixth Circuit on one hand professes to "stop short of utter hopelessness."[61] On the other hand, however, the Court maintains that "the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment."[62] In either case, a debtor should not be made "a slave to the loans" or otherwise be deprived "of any future hope for financial independence."[63]

When making determinations regarding this factor, the Sixth Circuit has considered the debtor's monthly expenses, both standing alone and in contrast with the debtor's monthly income, and the debtor's annual income in relation to the Poverty Guidelines. To be sure, in Cheesman v Tenn Student Assistance Corp (In re Cheesman),[64] one of the Sixth Circuit's most seminal decisions on the issue of undue hardship, the husband and wife debtors sought a discharge of approximately $30,000 in outstanding debts, of which $14,267 was

attributable to guaranteed student loans. The debtors' gross income was $15,676, leaving them a net income of $13,720. They provided the court with an expense chart listing monthly expenses that totaled $1,594. Included in this chart was a $100 monthly tuition expense to send one of their two children to a private school because the debtors found the threat of corporal punishment posed by public schooling unacceptable. The couple's daughter had asthma and required medical treatment which further accounted for $140 in medical fees listed on the expense chart. Although the couple's health insurance was paid by his employer, the family nevertheless incurred various expenses related to their daughter's asthma condition because of their high deductible. The debtors owned a 1988 Chevrolet Nova, worth approximately $3,000, on which they owed $7,081 and paid in monthly payments of $350.[65]

Although the lower court did not state which test it had used to determine that the loans imposed an undue hardship, the Sixth Circuit concluded that "the loans were dischargeable under any undue hardship test the court may have used in reaching its decision."[66] That panel reasoned that

> there was no indication that the debtors were capable of paying the loans while maintaining a minimal standard of living. The debtors' 1992 gross income of $15,676 exceeded by only a slim margin the government's 1992 poverty income guideline of $13,950 for a family of four. The expense chart presented by the Cheesmans demonstrated that they maintained a frugal lifestyle consistent with their low income. Despite this fact, the Cheesmans had a monthly deficit of approximately $400. Under these circumstances, we are satisfied that the Cheesmans could not maintain a minimal standard of living for their family if they were required to repay their loans.[67]

As indicated in its holding, the Cheesman Court considered the Poverty Guidelines in conjunction with a comparative analysis of the debtor's income and expenses.

In Tenn Student Assistance Corp v Hornsby (*In re* Hornsby)[68] the husband and wife debtors, who had three small children, sought to discharge educational loans that totaled $33,387.67 at the time of the dischargeability proceeding. The couple had $2,556.66 in disposable monthly income and $2,364.90 in monthly expenses, leaving them an operating monthly surplus of $191.76 to $280.43, depending on whether the husband earned overtime for a particular month.[69] The loan guarantor argued that the debtors had not "tighten[ed] their belts" inasmuch as 1) the couple had recently purchased a newer used automobile, which had resulted in an increase in their automobile repair expenses; 2) the couple had moved from Tennessee to Texas, thereby increasing their monthly rental expense by $200; 3) the couple had "relatively high bills for telephone use, electricity, meals eaten out, and cigarettes"; and 4) the couple's income well exceeded the standard for a family of five established in the Poverty Guidelines, since their projected income would exceed $36,000 while the Poverty Guidelines for a family of five was only $17,710.[70] The lower court found that 1) although the car expenditure might have been ill-advised, the couple had purchased the car with a good-faith belief that it would decrease their expenses, and 2) the couple's move to Texas had been necessitated by a need for greater job security for the parties. Accordingly, the bankruptcy court concluded that the debtors were not capable of paying their student loans and maintaining a minimal standard of living and granted them a hardship discharge. The court did not address the issue regarding the couple's bills for telephone use, electricity, meals eaten out, and cigarettes.[71]

thirty (30) year repayment plan," it determined that the debtor had not established undue hardship.[77] Despite the absence of any demonstrable undue hardship, the court exercised its equitable powers and fixed the debtor's educational loan debt payment at $200 per month for ten years, effectively discharging $86,469.38 of the debtor's $110,469.38 loan debt.[78]

In Dolph v Penn Higher Ed Assist Agency (*In re* Dolph),[79] the debtor successfully established undue hardship by showing that at the time of the adversary proceeding his monthly household expenses exceeded his monthly household income by approximately $500. The debtor further established that he had no substantial assets to sell in order to repay the loan. Both the debtor and his wife testified that the only portion of their budget that could possibly be adjusted was the amount allocated to food. On the facts of this case, the Sixth Circuit did not hesitate to find that the debtor had sufficiently established that he was unable to repay the loans while maintaining a minimal standard of living.[80]

In Rice v United States (*In re* Rice)[81] the Sixth Circuit upheld the lower court's refusal to discharge the debtor's educational loans, noting that repayment would not reduce the debtor's standard of living to below or near the poverty level as determined by the Poverty Guidelines. The Court also made particular note of the fact that the debtor's children were presumably attending private schools and that the family claimed expenses for "Recreation/vacations."[82] The Rice Court also took special note of the fact the debtors' claimed expenses had, "without apparent reasonable justification, undergone a 'disturbing' increase over a short period."[83]

Taking the Court's rulings on this criterion as a whole, a general rule evolves whereby the Sixth Circuit is apt to find undue hardship when a debtor's gross income is at or near the Poverty Guidelines and, despite a frugal lifestyle, his expenses exceed his income.

D. Likelihood that State of Affairs Will Persist

The second prong of the Brunner test requires a court to determine whether additional circumstances exist which indicate that the present financial state of affairs is likely to persist for a significant portion of the repayment period of the student loans.[84] Such circumstances must be indicative of a "certainty of hopelessness, not merely a present inability to fulfill financial commitment."[85] "They may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents."[86] "And, most importantly, they must be beyond the debtor's control, not borne of free choice."[87] "Choosing a low-paying job cannot merit undue hardship relief."[88] Although the Court has acknowledged that determining future persistence of present factors is "necessarily speculative," this fact "does not relieve the debtor of the burden of proving that he will be obstructed from earning a living in the future."[89]

The Court has typically employed two factors when determining this issue: the debtor's physical and mental faculties and the likelihood of the debtor's prospective gainful employment. The Court has not attached much reasoning to its consideration of a debtor's physical and mental faculties. For example, in Tenn Student Assistance Corp v Hornsby (*In re* Hornsby),[90] the bankruptcy court had found that the debtors' earning capacity was likely to remain relatively constant for many years, despite the fact that current day-care expenses might dissipate over time, because any additional money saved from the day-care expenses would be insignificant. Rather than focus on the amount of income by which the debtors would be increased once relieved of the day-care expenses, the Sixth Circuit reversed, summarily concluding that the debtors "are 'young as well as healthy, and in all likelihood [their] income will increase in the future.'"[91] Other panels of the Court have similarly ruled

that debtors who are "intelligent and well-spoken, albeit underemployed" fail to establish that their state of affairs would likely persist for a significant portion of the repayment period.[92] Presumably, the Court assumes that a debtor who is healthy, intelligent, and articulate will be able to remedy his financial plight in an amount of time which is less than a significant portion of the repayment period of the student loans.

Although the Court has been relatively more articulate when deciding the likelihood of a debtor's prospective gainful employment, this criterion has also proven difficult to implement. For instance, in Cheesman v Tenn Student Assistance Corp. (In re Cheesman),[93] the husband debtor testified that he hoped to receive a promotion within the near future, and the wife debtor was receiving unemployment benefits, actively seeking employment, and had been placed on the Board of Education's preferred hiring list. Upon affirming the bankruptcy court's finding of undue hardship, the Sixth Circuit reasoned:

> Second, there was no indication that the debtors' financial situation would improve in the foreseeable future. True, Dallas testified that he was hoping for a promotion at his current job, and Margaret testified that she was actively seeking employment. There is no assurance, however, that either will obtain their objectives. Moreover, Margaret's employment history does not indicate that the Cheesmans' financial condition would improve considerably if she obtained a position as a teacher's aide. At best, she worked only intermittently as a teacher's aide. She received only minimal wages before her position was eliminated. Also, the court properly considered the fact that Margaret's unemployment compensation would run out within two weeks of the hearing and that this would burden further the Cheesmans' financial situation.[94]

Judge Guy dissented, finding that the debtors had not established that current circumstances would prevent their financial condition from improving in the future or that they had acted in good faith:

> The Cheesmans are not disabled. They are not ill. They are not elderly. They are both college trained. At the time of the bankruptcy hearing, Mr. Cheesman held a job, and he testified that there was the possibility of a

> promotion with his current employer. Mrs. Cheesman is qualified to tutor or substitute teach, as she did prior to the filing of the Chapter 7 petition. These circumstances are inapposite of those in cases in which a court has found "additional circumstances" to exist.[95]

Relying upon Cheesman, the Court has subsequently clarified that an "effective job search" need not equate to a "successful job search."[96] In Dolph v Penn Higher Ed Assist Agency (In re Dolph),[97] the bankruptcy court heard considerable evidence about the debtor's efforts to obtain employment. The debtor testified that he had sent out approximately 200 resumes before obtaining his current employment with a car rental agency. The court also heard testimony from the loan guarantor's expert witness that the debtor had not conducted an effective job search. The Dolph Court explained:

> It should be noted that, throughout the trial proceedings and during this appeal, both parties frequently used the phrase "effective job search," apparently to mean "successful job search," *i.e.*, a job search that resulted in employment or higher paying employment. Cheesman does not require the Debtor to conduct such a job search. In Cheesman, the debtors' job search did not result in higher paying employment; nevertheless, the court of appeals sustained the bankruptcy court's discharge of their student loans. The debtor's job search and the results of such a search, however characterized, are simply factors, among all other relevant factors, that the bankruptcy court would consider in applying the second part of the Cheesman test.[98]

In Oyler v Educational Credit Management Corp (*In re* Oyler),[99] the lower court granted the debtor, a 48-year-old married pastor with three children and leader of a Messianic Jewish congregation, a hardship discharge of approximately $40,000 in educational loans. Before founding his church, the debtor had earned bachelors and master's degrees, worked as a salesman and audio engineer, and once owned his own business. At the time of trial, the debtor's family income had been less than $10,000 for each of the preceding two years -- well below the Poverty Guidelines for a family of five. The church congregation provided the family with an apartment and a salary around $1,200 per month, which varied depending

on the congregation members' contributions. The family had no health insurance, and the debtor suffered four retinal detachments as a result of a medical condition. The only debts which the debtor sough to discharge were his educational loan debts.

To establish that circumstances existed which indicated that the debtor's present financial state of affairs were likely to persist for a significant portion of the repayment period of the student loans, the debtor testified that he was completely committed to his calling as a minister in his Messianic Jewish congregation and that his circumstances would be likely to continue for the foreseeable future. Additionally, two pastors testified that the debtor was committed to his calling and that his circumstances were unlikely to change. The lower court granted the debtor a hardship discharge of $38,978.20 in educational loans. The guarantor appealed on the grounds that the debtor's circumstances were not likely to persist for the foreseeable future because the bankruptcy court refused to consider that the debtor could have simply obtained a higher paying job either with a different congregation or in another field. The Sixth Circuit agreed, and held that the debtor had failed to satisfy the second prong of the Brunner test because he had "shown no 'additional circumstances . . . indicating that this state of affairs is likely to persist for a significant portion of the repayment period.'"[100]

> Oyler's choice to work as a pastor of a small start-up church cannot excuse his failure to supplement his income so that he can meet knowingly and voluntarily incurred financial obligations. By education and experience he qualifies for higher-paying work and is obliged to seek work that would allow debt repayment before he can claim undue hardship. See *In re* Storey, 312 BR at 872 (debtor must do everything in his power to improve financial situation); *In re* Kraft, 161 BR at 86-87 (debtor needed to look for all job opportunities before claiming undue hardship). The Bankruptcy Court erred by not considering that Oyler's decision not to maximize his earnings, though commendable, was voluntarily made after he also voluntarily incurred the debt that he now wishes to discharge.[101]

Thus, according to Oyler a debtor may not voluntarily decrease his likelihood of obtaining prospective gainful employment then seek a discharge as an undue hardship based upon his voluntary decision.

It is imperative that a bankruptcy court's factual findings be clear regarding a debtor's likelihood of prospective gainful employment. In Dolph v Penn Higher Ed Assist Agency (In re Dolph),[102] the lower court found that "[a] lack of skill at obtaining optimum employment does not require that [Dolph] be penalized with a finding of nondischargeability where other factors suggest the contrary result. All in all, it appears [Dolph] has made honest, albeit inept, efforts to find better employment."[103] The Sixth Circuit noted that while the debtor's efforts associated with his job search could be a component of the debtor's good faith efforts to repay the loans, the propriety of a debtor's job search is more relevant to determining whether additional circumstances exist which indicate that the debtor's financial situation is likely to persist. Because the appellate court in Dolph was unclear to what extent and under what branch of the Brunner test the bankruptcy court had considered the debtor's job search efforts, it vacated the lower court's ruling and remanded the case for further factual findings.[104] Similarly, the lower court in Dolph found that the debtor would not be able to make any payments on the loan in the reasonably foreseeable future without substantial hardship to his family and that the debtor did not have, nor would he have in the reasonably foreseeable future, sufficient saleable assets or disposable income which could be applied toward repayment of the loans, absent sacrifice to the immediate needs of his family. Thus, the bankruptcy court concluded that "[t]he question of what [Dolph's] future holds in store for him -- be it a new and better job or be it a promotion with his present employer -- is unknown, and any immediate evaluation of the likelihood for positive change in [Dolph's]

present or future financial circumstances is speculative and not a firm basis for the Court to reach a decision." [105] The Sixth Circuit found the bankruptcy court's findings ambiguous and inadequate to support the conclusion that the debtor had satisfied his burden to establish, by a preponderance of the evidence, that additional circumstances exist which would make it likely that his current inability to repay the educational loans would persist. Accordingly, the appellate court remanded for clarification of the bankruptcy court's findings.[106]

E. *Bona Fide* Efforts to Repay Loans

The last prong of the Brunner test requires that the debtor make good faith efforts to repay the loans.[107] The Sixth Circuit's decisions on this point are clear: Hardship discharges will be denied absent a showing of at least a minimal good faith effort to repay the educational loans. In making this determination, the Court has looked not only to the number and amount of loan payments but also to the timing of the loan payments in relation to the timing of the bankruptcy petition seeking discharge of the educational loans.

For example, in Tenn Student Assistance Corp v Hornsby (*In re* Hornsby),[108] the bankruptcy court had found in a conclusory fashion that the husband and wife debtors had exhibited good faith efforts in managing their student loans, despite the fact that they had failed to make even a single payment. The Sixth Circuit reversed, finding the lower court's ruling unsupported by the evidence.[109]

Thereafter, in Miller v Penn Higher Ed Assist Agency (*In re* Miller),[110] the Sixth Circuit held that the debtor had failed to show that she had made good faith efforts to repay the loans "because in the five years since she had left school, she had contributed only $368 towards repayment of her student loans, which totaled almost $90,000, while using such 'non-essentials' as personal internet service, long distance telephone service, cell phone

service, and cable television."[111] Thus, the Miller court considered the amount of the loan repayment as well as the amount of the payment in contrast to the debtor's expenditures for other items.

In Rice v United State (*In re* Rice)[112] the Court refused to grant a hardship discharge, noting that the outstanding educational loan debt was largely the debtor's own doing because of his minimal repayments -- some made involuntarily through garnishment proceedings – and that these payments reflected little effort on his part to satisfy the original obligation. This factor weighed particularly heavy against discharge in light of the complete absence of any evidence that dire financial circumstances prevented the debtor from making a larger impact on the debt.[113]

Not only have courts considered debtors' efforts at repayment of their educational loans, they have also considered the timing of loan payments in relation to the timing of the petition seeking bankruptcy relief. Thus, in Cheesman v Tenn Student Assistance Corp (*In re* Cheesman),[114] the Sixth Circuit affirmed the bankruptcy court's finding of undue hardship, noting:

> Third, there was no evidence that the Cheesmans did not act in good faith. This is not a case where the petitioner seeks discharge within a month of loans becoming due. The Cheesmans made minimal payments on their loans several years after their loans became due and at least a year before filing for bankruptcy. Furthermore, the Cheesmans chose to work in worthwhile, albeit low-paying, professions. There is no indication that they were attempting to abuse the student loan system by having their loans forgiven before embarking on lucrative careers in the private sector. In light of these considerations, we hold that the Cheesmans' student loans imposed an undue hardship.[115]

Again, Judge Guy dissented, finding that the debtors had not established that they had acted in good faith since, during the six-year period after the loans first became due and owing, the debtors had made only two $50 payments on each of their loans. There also was

no evidence that the debtors sought the less drastic remedy of a deferment of payments on their debts before attempting to discharge them.[116]

A bankruptcy court's failure to make sufficient findings regarding a debtor's good faith efforts, or lack thereof, to repay the educational loans is fatally defective. In Dolph v Penn Higher Ed Assist Agency (*In re* Dolph),[117] although the debtor had made 21 payments owed on his educational loans and had not sought a discharge shortly after his loans became due, the Sixth Circuit remanded "for the required findings" because the lower court record was "silent concerning the issue of good faith."[118]

The Sixth Circuit has also noted that an unbalanced ratio of educational loan debt to the other debts set forth in the bankruptcy petition may be suggestive of a bad faith intent to merely discharge educational loan debt.[119]

VI. Conclusion

Over the course of the last thirty years, Congress has found the notion of a "fresh start" for debtors seeking to discharge educational loans in bankruptcy proceedings outweighed by a purported effort to maintain the integrity of federally-guaranteed educational loan programs. In the complete absence of any defining criteria, courts have struggled with the task of determining when the failure to discharge educational loans would impose an undue hardship on the debtor and his dependents. The lack of uniformity amongst Sixth Circuit decisions is perhaps symptomatic of the Court's internal struggle between wanting to advance the values of a post-secondary education while not subjecting government-sponsored loan guarantee programs to undue abuse by the less scrupulous. The Sixth Circuit may have put it best when it declared: "It is clear that Congress intended to make discharge of a student loan more difficult to discharge than other types of debt,

although not impossible."[120] This attempt to make hardship discharges difficult, yet possible, has succeeded inasmuch as "nondischargeability has become the broad rule with only a narrowly construed undue hardship discharge."[121] Thus, Congress has apparently triumphed in its effort to exalt the fiscal integrity of government programs over the notion of a "fresh start" for debtors burdened with educational loan debt.

Endnotes

1 Discharging student loans in bankruptcy: the bankruptcy court tests of 'undue hardship,' 26 Ariz L Rev 445 (1984).

2 Id.

3 Id.

4 At the time of this writing, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has passed both the United States Senate and House of Representatives and awaits signing by President Bush. Because it has not yet been signed into law, its effects on the dischargeability of student loans is not considered in this paper.

5 US Const, Art I, § 8, cl 4.

6 Local Loan Co v Hunt, 292 US 234, 244; 54 S Ct 695; 78 L Ed 1230 (1934).

7 The dischargeability of Health Education Assistance Loans ("HEAL loans") is determined by a more stringent standard than that applied to typical educational loans, allowing discharge only when failing to do so "would be unconscionable." See 42 USC § 292f(g)(2); Rice v United State (*In re* Rice), 78 F3d 1144, 1148 (CA 6, 1996). Despite the "significantly more stringent" unconscionability standard, the factors relevant to determining whether a HEAL loan should be discharged are also relevant when evaluating the discharge of ordinary educational loans. Miller v Penn Higher Ed Assist Agency (*In re* Miller), 377 F3d 616, 622 n 2 (CA 6, 2004); Tenn Student Assistance Corp v Hornsby (*In re* Hornsby), 144 F3d 435, 437 n 4 (CA 6, 1998).

8 Hornsby, 144 F3d at 435 n 2 (citing Patricia Somers & James M Hollis, Student Loan Discharge Through Bankruptcy, 4 Am Bankr Inst L Rev 457, 459 [1996]).

9 Discharging student loans in bankruptcy: the bankruptcy court tests of 'undue hardship,' 26 Ariz L Rev at 448.

10 National Bankr Rev Comm'n, Bankruptcy: The Next Twenty Years, § 145 (Oct 20, 1997) (citing Hearings on HR Rep No 95-595, 95th Cong 159 (1977) (statement of Ronald J Iverson, Executive Director, Vt. Student Assistance Corp reporting on several cases where student loans comprised majority of debt discharged in bankruptcy).

11 Id.

12 Id.

13 Id. (citing bankruptcy rate of guaranteed student loans at .23%)

14 Id.

15 Id.

[16] Id.

[17] Tennessee Student Assistance Corp v Hood, 541 US 440; 124 S Ct 1905, 1911-1913; 158 LEd2d 764 (2004).

[18] Discharging student loans in bankruptcy: the bankruptcy court tests of 'undue hardship,' 26 Ariz L Rev at 446-447 (citing Time of Reckoning for Student Deadbeats, US News & World Report, p 21 [July 18, 1977]; Study Now, Pay Never, Newsweek, p 95 [March 7, 1977]; Student Loan Mess, Time, p 8 [Dec 8, 1975]). Some commentators have opined that Congress' rendering student loan debts nondischargeable was in response to a "perceived" rapid increase in abusive student debtor filings. See, 13 JC & UL 1, Student Loans, Chapter 13 of the Bankruptcy Code, and the 1984 Bankruptcy Amendments, pp 2-3 (Summer, 1986). See also, Hearings on HR 31 and HR 32 Before the Subcomm on Civil and Constitutional Rights of the Comm on the Judiciary, 94th Cong, pt 2, at 1096 (1976) (Rep. Don Edwards expressing concern over lack of evidence of significant abuse in light of legitimate purposes of bankruptcy law). This lack of evidence caused one House member to describe the nondischargeability provision as a "discriminatory remedy for a 'scandal' which exists primarily in the imagination." See, HR Rep No. 95-595, at 148 (1977) (remarks of Representative O'Hara). Evidence that Congress had been motivated by the spurious media reports is borne out by the record, see S Rep No. 882, 94th Cong, 2d Sess 32, reprinted in 1976 US Code Cong & Ad News 4731, 4744, prompting commentators to conclude that "the problem that concerned Congress was created by the press." Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of 'Undue Hardship', 26 Ariz L Rev at 446.

[19] See, Education Amendments of 1976, Pub L No 94-482, § 439A, 90 Stat 2081, 204.

[20] See, Bankruptcy Act Revisions Hearings on HR 31 and 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong, 1st & 2d Sess 1065, 1076 (1976) (between 1974 and 1975 the number of claims by lenders for debts discharged in bankruptcy increased by 599%) and Student Loan Bankruptcies, 1978 Wash U LQ 593 n 1-3. For additional statistics concerning discharges of federally insured student loans in bankruptcy, see HR Rep No. 595, 95th Cong 1st Sess 133-147, reprinted in 1978 US Code Cong & Ad News 5963, 6095-6108.

[21] Pub L 95-598.

[22] The five-year dischargeability and undue hardship provisos were actually added to HR 8200 by H Amend 783. An attempt to further amend H Amend 783 was made by H Amend 784, which would have prohibited, within a five-year period, the discharge of debts only if the educational loan constituted sixty-five percent or more of the person's indebtedness. The latter amendment was rejected by the House.

[23] 124 Cong Rec S33998 (daily ed Oct 5, 1978) (statement of Sen. DeConcini). The limited applicability of this section to governmental units and nonprofit institutions of higher education was expanded in 1979 to include "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 of higher education." See, Pub L 96-56 §3(1).

[24] Bankruptcy: The Next Twenty Years, supra, at § 145.

[25] See, 11 USC § 523, Historical and Statutory Notes.

[26] Bankruptcy: The Next Twenty Years, supra, at § 145.

[27] Pub L 103-394, § 603, 108 Stat 4106, 4147 (codified at 11 USC cmt preceding § 101).

[28] Bankruptcy: The Next Twenty Years, supra, at § 145.

[29] Id.

[30] 42 Drake L Rev 205, 219 (1993).

[31] 48 Ohio St LJ 1047, 1085-87 (1987).

[32] Bankruptcy: The Next Twenty Years, supra, at § 145.

[33] Id.

[34] Id.

[35] Id.

[36] Id.

[37] See, Higher Education Amendments of 1998, Pub L No 105-244, § 971, 112 Stat 1581, 1837 (1998). The repealer applied only to cases filed after the October 7, 1998 enactment date. Id.

[38] See, 11 USC § 523, Historical and Statutory Notes.

[39] Ruehle v Educational Credit Mgmt Corp (*In re* Ruehle), 307 BR 28, 32 & n 2 (CA 6 Bankr App Ct, 2004). Part VII of the Bankruptcy Rules deals specifically with adversary proceedings. Bankruptcy Rule 7001(6) provides that "a proceeding to determine the dischargeability of a debt" is an adversary proceeding.

Bankruptcy Rule 4007, entitled "Determination of Dischargeability of a Debt," sets forth the parties who may file to determine the dischargeability of a debt as well as the time frame for filing the complaint. Bankruptcy Rule 4007(e) provides that a complaint initiated pursuant to that rule is "governed by Part VII of the rules" referring back to the adversary procedures. Cf., Ruehle, supra (holding that creditor had been denied due process of law where debtor had included a "discharge by declaration" provision in Chapter 13 Plan, effectively obtaining a discharge without adequate notice to creditor).

40 United Student Aid Funds, Inc v Paolini (*In re* Paolini), 124 F3d 199; 1997 WL 476515 at *3 (CA 6, 1997) (table) (citing Foreman v Higher Educ Assistance (*In re* Foreman), 119 BR 584 [Bankr SD Ohio 1990]). Whichever test is employed by the court, the debtor bears the burden of proof on each part of the test and his failure to sustain that burden at any point ends the court's analysis and defeats the attempt to discharge the loan. Paolini, 1997 WL 476515 at *4. But see, Healey v Mass Higher Education (*In re* Healey), 161 BR 389 (ED Mich, 1993):

> Under 11 USC § 523(a)(8)(B), the burden is divided between the parties. It is incumbent upon the creditor to initially establish the existence of the debt -- which is owed to, insured or guaranteed by a governmental agency or a nonprofit institution of higher learning -- and that the debt first became payable less than seven years prior to the date of the filing of the petition. * * * * The burden then shifts to the debtor to prove, by a fair preponderance of the evidence, that excepting her educational loans from discharge would constitute an "undue hardship." To satisfy her burden, the Debtor is required to establish all three prongs of the Brunner test by a preponderance of the evidence. Healey, 161 BR at 393-394 (citations omitted).

41 Rice, 78 F3d at 1148 n 5.

42 Id.

43 Id.

44 Id.

45 Miller, 377 F3d at 624.

46 Oyler v Educational Credit Mgmt Corp (*In re* Oyler), 397 F3d 382, 384 (CA 6, 2005).

47 Cheesman v Tenn Student Assistance Corp (*In re* Cheesman), 25 F3d 356, 359 (CA 6 1994).

48 Hornsby, 144 F3d at 436. See also, Fed R Bankr P 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses").

49 Id.

50 Discharging student loans in bankruptcy: the bankruptcy court tests of 'undue hardship,' 26 Ariz L Rev at 446-447.

51 Hornsby, 144 F3d at 437 n 4.

52 5 BCD 532 (Bankr ED Pa, 1979).

53 72 BR 913 (Bankr ED Pa, 1987).

54 831 F2d 395 (CA 2, 1987).

55 831 F2d 395 (CA 2, 1987).

56 Oyler v Educational Credit Management Corp (*In re* Oyler), 397 F3d 382, 385 (CA 6, 2005). The Sixth Circuit describes Brunner as "the test that has been most widely applied Hornsby, 144 F3d at 437 n 4. See also, Dolph v Penn Higher Ed Assist Agency (*In re* Dolph), 215 BR 832, 845 (CA 6 BAP 1998) ("The overwhelming majority of cases to consider the Brunner test have adopted its application").

57 Id.

58 Id.

59 Hornsby, 144 F3d 435, 438 (CA 6, 1998) (quoting Correll v Union Nat'l Bank of Pittsburgh [*In re* Correll], 105 BR 302, 306 [Bankr WD Pa 1989]).

60 Rice, 78 F3d at 1151.

61 Hornsby, 144 F3d at 437 n 4 (citing Robert F Salvin, Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?, 71 Tul L Rev 139, 149-53 [1996]). See also, Hornsby, 144 F3d 435, 438 (CA 6, 1998) ("This is not to say that the Hornsbys are not financially burdened; moreover, they need not live in abject poverty before a discharge is forthcoming").

62 Cheesman, 25 F3d at 359-60 (citing Matter of Roberson, 999 F2d 1132, 1136 [CA 7 1993]).

63 Miller, 377 F3d at 623-24 (2004) (quoting lower court which it reversed).

[64] 25 F3d 356 (1994), reh and sugg for reh en banc den, cert den sub nom Tennessee Student Assistance Corp v Cheesman, 513 US 1081 (1995).

[65] Cheesman, 25 F3d at 358-59.

[66] Cheesman, 25 F3d at 359.

[67] Cheesman, 25 F3d at 359-60.

[68] 144 F3d 435 (CA 6, 1998).

[69] Hornsby, 144 F3d at 435-436.

[70] Hornsby, 144 F3d at 436 (citing the Annual Update of HHS Poverty Guidelines, 60 Fed Reg 7772, 7772 [1995]).

[71] Id.

[72] Hornsby, 144 F3d at 437-438.

[73] Id.

[74] Hornsby, 144 F3d at 438 (all citations omitted).

[75] Id.

[76] 97 Fed Appx 6 No 02-3003, 2004 WL 445167 (CA 6, March 8, 2004), declined to follow on other grounds in Miller v Penn Higher Ed Assist Agency (*In re* Miller), 377 F3d 616 (CA 6, 2004).

[77] 97 Fed Appx 6 No 02-3003, 2004 WL 445167 *2.

[78] Partial discharges of educational loans are permitted if a debtor proves undue hardship but the court nevertheless believes that something less than full discharge is necessary to remedy the hardship. Miller, 377 F3d at 622. Although beyond the scope of this paper, a variety of less drastic remedies other than complete discharge have been utilized by the courts to balance a debtor's impecunity with the creditors' rights to repayment, including by way of illustration, partially discharging loans whether by discharging an arbitrary amount of the principal, accrued interest, or attorney's fees, Hornsby, 144 F3d at 440, staying discharge of the loan and revisiting the dischargeability at a later date, Cheesman, 25 F3d at 360-61, setting a graduated repayment schedule, Hornsby, supra, (citing Berthiaume v Pennsylvania Higher Educ Assistance Auth (*In re* Berthiaume), 138 BR 516, 521 [Bankr WD Ky, 1992]), staying execution on the debt despite nondischargeability, Hornsby, supra, (citing Heckathorn v United States [*In re* Heckathorn], 199 BR 188, 196 [Bankr ND Okla, 1996]), placing a moratorium on the accrual of further interest for a specified period of time, Hornsby, supra, (citing Heckathorn, 199 BR at 196), establishing a repayment schedule, Hornsby, supra, (citing Heckathorn, 199 BR at 196), deferring repayment of the loan, Rice, 78 F3d at 1152 n 9 (citing Sands v United Student Aid Funds, Inc [*In re* Sands], 166 BR 299, 312-13 [Bankr WD Mich, 1994]), retaining jurisdiction to supervise payments under repayment plan, Rice, supra, (citing Wardlow v Great Lakes Higher Educ Corp [*In re* Wardlow], 167 BR 148, 152-53 [Bankr WD Mo, 1993]), and denying discharge without prejudice to the debtor reopening proceedings at a later date to revisit the question of undue hardship. Hornsby, 144 F3d at 440. Thus, even if a debtor establishes that his educational loans are dischargeable pursuant to section 523(a)(8)(B) as an undue hardship, it does not necessarily follow that he will receive a full discharge of his educational loan debt. Cf, Cheesman, 25 F3d at 360-61 (ordering that dischargeability of loans be reviewed in eighteen months despite fact that debtor established that they imposed undue hardship at time of adversary proceeding).

[79] 215 BR 832 (CA 6 BAP 1998).

[80] Dolph, 215 BR at 836.

[81] 78 F3d 1144 (CA 6, 1996).

[82] But see, Cheesman, 25 F3d at 358-59 (discharging educational loans despite $100 monthly tuition expense for private schooling of young child where debtors found threat of corporal punishment posed by public schooling "unacceptable").

[83] Id.

[84] Id.

[85] Oyler v Educational Credit Management Corp (*In re* Oyler), 397 F3d 382, 385-386 (CA 6 BAP, 2005) (citing *In re* Roberson, 999 F2d 1132, 1136 [7th Cir1993]).

[86] Oyler, 397 F3d at 386 (citing Kraft v New York State Higher Educ Serv Corp [*In re* Kraft], 161 BR 82, 84 [Bankr WD NY, 1993]).

[87] Oyler, 397 F3d at 386 (citing Fischer v State Univ of New York [*In re* Fischer], 23 BR 432, 434 [Bankr WD Ky, 1982]).

[88] Oyler, 397 F3d at 386 (citing Healey v Massachusetts Higher Educ [*In re* Healey], 161 BR 389, 395 [ED Mich, 1993] ("A resolute determination to work in one's field of dreams, no matter how little it pays, cannot be the fundamental standard from which 'undue hardship' . . . is measured.").

[89] Paolini, 1997 WL 476515 at *6 (table) (citing Roberson, 999 F2d at 1137).

[90] 25 F3d 356 (1994), reh and sugg for reh en banc den, cert den sub nom Tennessee Student Assistance Corp v Cheesman, 513 US 1081 (1995).

[91] Hornsby, 144 F3d at 438 (quoting Rice, 78 F3d at 1150).

[92] Miller, 377 F3d at 623.

[93] 25 F3d 356 (1994), reh and sugg for reh en banc den, cert den sub nom Tennessee Student Assistance Corp v Cheesman, 513 US 1081 (1995).

[94] Cheesman, 25 F3d at 360.

[95] Cheesman, 25 F3d at 362 (Guy, J, dissenting).

[96] Dolph, 215 BR at 837.

[97] Id.

[98] Id.

[99] 397 F3d 382 (CA 6 BAP, 2005).

[100] 397 F3d at 385-386.

[101] Id.

[102] Dolph, 215 BR at 837.

[103] Id.

[104] Id.

[105] Dolph, 215 BR at 837-38.

[106] Dolph, 215 BR at 838.

[107] Id.

[108] 25 F3d 356 (1994), reh and sugg for reh en banc den, cert den sub nom Tennessee Student Assistance Corp v Cheesman, 513 US 1081 (1995).

[109] Hornsby, 144 F3d at 438.

[110] 377 F3d 616 (2004).

[111] Miller, 377 F3d at 623-24.

[112] 78 F3d 1144 (CA 6, 1996).

[113] Rice, 78 F3d at 1150-1151.

[114] 25 F3d 356 (1994), reh and sugg for reh en banc den, cert den sub nom Tennessee Student Assistance Corp v Cheesman, 513 US 1081 (1995).

[115] Cheesman, 25 F3d at 360 (citation omitted).

[116] Cheesman, 25 F3d at 360, 362 (citation omitted).

[117] 215 BR 832 (CA 6 BAP 1998).

[118] Dolph, 215 BR at 838.

[119] Rice, 78 F3d 1144, 1150-1151.

[120] Dolph, 215 BR at 835 (emphasis supplied).

[121] Bankruptcy: The Next Twenty Years, supra, at § 145.