SO ORDERED.

SIGNED this 11 day of April, 2005.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
DANIEL HERMAN STOCKSTILL,	)	
SUSAN KAY STOCKSTILL,	)	
	)	**Case No. 02-42526**
Debtors.	)	**Chapter 7**
	)	
DANIEL HERMAN STOCKSTILL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 03-7030**
	)	
A.C.S. also known as AFSA Data Corp., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEBTOR'S COMPLAINT FOR DISCHARGE OF STUDENT LOAN

This is an adversary proceeding pursuant to 11 U.S.C.A. § 523(a)(8)[1] to determine the dischargeability of plaintiff Daniel Herman Stockstill's (Debtor) student loan indebtedness to defendant Educational Credit Management Corporation ("ECMC"). The plaintiff Debtor appears by Paul Post of Paul Post, P.A. The defendant, ECMC, appears by N. Larry Bork, of Goodell Stratton Edmonds & Palmer, LLP. There are no other appearances. This is a core proceeding[2] over which the Court has subject matter jurisdiction.[3] Venue is proper.[4] The parties do not contest jurisdiction or venue.

Debtors, Daniel Herman Stockstill and Susan Kay Stockstill, filed for relief under Chapter 7 on September 24, 2002. Debtor Daniel Herman Stockstill filed a Complaint to Determine Dischargeability of Student Loan based upon undue hardship against defendant AFSA Data Corporation.[5] ECMC filed an answer stating that it was the holder of two consolidated loans assigned to it from USA Funds with an estimated balance of $119,862.40[6] and was unaware whether the named

---

[1] Future references to the Bankruptcy Code in the text shall be to the section only.

[2] 28 U.S.C.A. §157(b)(2)(I).

[3] 28 U.S.C.A. § 1334.

[4] 28 U.S.C.A. § 1408.

[5] Doc. No. 1.

[6] Because the parties have consistantly treated the Debtor's student loan obligation as if it were a single note, the Court likewise will refer to the entire amount due as a student loan.

defendant had additional loans.[7] ECMC moved to be added as a defendant.[8] The motion was granted.[9] A Journal Entry of Judgment based upon default was entered against AFSA Data Corporation.[10]

An evidentiary hearing was held. The Debtors testified, exhibits were admitted without objection, and the Court heard argument. Post trial briefs were filed.[11] The Court is now ready to rule.

FINDINGS OF FACT.

Having heard the testimony of witnesses and considered the exhibits admitted into evidence, the Court makes the following findings of fact.

Debtor Daniel Herman Stockstill is 57 years old.[12] He received his B.A. degree from McPherson College in 1968 and his B.S. degree from Black Hills State University in Spearfish, South Dakota in 1975. He has credit hours towards his doctorate but has not finished his dissertation. He was employed as a teacher and then later as a high school principal and superintendent of schools. Most recently he was the high school principal and superintendent of schools in North Jackson USD 335, Holton, Kansas. Debtor submitted his resignation at the end of the 2002 school year because he had been told the school district would not renew his contract.

---

[7] Doc. No. 4.

[8] Doc. No.5.

[9] Doc. No. 9.

[10] Doc. No. 16.

[11] Doc. Nos. 32 and 33.

[12] Trial was held on February 18, 2004.

At the time of trial, Debtor was an inpatient at an alcohol rehabilitation hospital and was due to be released the day after trial. He was required to continue his treatment with a 10 week out patient program. He has been an alcoholic for many years. Upon retrospect, he believes that his alcoholism contributed to his need to terminate his employment with the USD 335. After he lost that job and could not find other employment, his drinking became out of control.

When employed by USD 335, Debtor and his wife lived in Circleville, Kansas. After his termination, he looked for other school district employment in the area, submitting 20 applications and being granted seven interviews. Debtor was not hired. Debtor determined that he could not stay in Circleville because of his large house payment. Debtor then sold his Circleville house and took early retirement, entitling him to monthly KPERS payments of approximately $1,700. In May or June 2002, Debtor and his wife moved to Geneseo in Central Kansas, where Debtor's wife's elderly parents live. Debtor's father, who is in his 80's, lives close by. Debtors received proceeds of approximately $32,600 from the sale of the Circleville house, which were used in part to purchase a 1997 Chevrolet four-wheel drive vehicle, replacing a 1978 Ford. Debtor and his wife also used $5,000 to purchase a two bedroom 1971 mobile home from a relative. Additional proceeds from the house sale were used to make the mobile home livable, including trimming trees, re-coating the road, rebuilding the steps, carpeting and installing tile flooring, and repairing the toilet. Debtor and his wife now live in the mobile home and have no house payments.

Since moving to Central Kansas, Debtor has been looking for jobs but has not obtained permanent employment. He applied for a position of facilities manager at Christian College, but was not offered the position. He is on the list to be called as a substitute teacher in Lyons, Ellsworth,

Holyrood, Claflin, Little River, and other towns within a reasonable driving distance. Debtor has worked helping to plant wheat, labored at a refinery for a couple of months, scrubbed floors, carried water, and coached basketball. Debtor believes that unknown persons in USD 335 have been sabotaging his employment attempts in the education field.. Debtor met with Monty Longacre, a counselor/consultant and a personalized rehabilitation specialist associated with Personalized Rehabilitation Specialist, Inc. of Clay Center, Kansas. Mr. Longacre concluded that it was "doubtful" that Debtor will be able to "continue to work as an educator and must look at other sources of revenue."

Debtor's wife is 57 years old. She has a high school education and cosmetology training. While living in Circleville, she was employed by Family Health Care where her rate of pay was $8.35 per hour. Since moving, she has not applied for work. She takes care of her elderly parents seven days a week; she cooks all of their meals, cleans their house, does the laundry, administers their medications, takes them to the doctor, and shops for them. She is always on-call. Her parents are in their 80s and have income of about $1000 per month and minimal assets. Their home is over 100 years old. If she were not taking care of her parents, it would be necessary for them to be placed in a home, but they do not have sufficient income to pay for such care. She intends to continue to provide the care to her parents. Debtor's wife drives an old car which has almost 300,000 miles on it. The debtor's wife had an annuity, which she cashed in.

The United States Individual Income Tax return filed by Debtor and his wife for tax year 2001 showed an adjusted gross income of $84,830. It reflects the salary Debtor received from USD 335 in the approximate amount of $75,500 and his wife's income from a Holton Community Hospital of

$9,573. For the 2002 tax year, the adjusted gross income was approximately $64,000, comprised of $46,004 from wages and salaries and $17,945 from pensions and annuities. Based upon the 2003 W-2's, the total income that year was $28,770.65. At the time of the hearing, the Debtor's only reliable income was $1,731.36 monthly benefit from the Kansas Public Employees Retirement System. At age 62, Debtor will be entitled to Social Security benefits of approximately $1,300 per month.

Debtor prepared a statement of monthly living expenses in the amount of $1,976.05, as follows:

Food	$ 200.00
Clothing	$ 50.00
Electric/gas	$ 95.25
Water/trash	$ 41.12
Cable TV	$ 58.10
Telephone	$ 96.17
Transportation	$ 233.26
Auto insurance	$ 134.94
Homeowners insurance	$ 45.82
Medical insurance	$ 646.00
Bank loan	$ 143.26
Vehicle repairs/upkeep	$ 71.83
Home repairs/upkeep	$ 40.93
Property taxes	$ 40.38
Medical bills (co-pay)	$ 12.50
Prescriptions	$ 66.49
TOTAL	**$1,976.05**

At the time of trial, Debtor was not paying the full $646 for health insurance, as he was not eligible for insurance at that time. The actual insurance expense was $311 for his wife. Debtor hoped to be eligible for health insurance in the near future. Debtor's wife testified that a more accurate estimate of monthly gasoline expense was $100. The Bank loan expense of $143 is for payment on two loans, at lease one of which will be paid off in less than a year from the date of trial. The Debtor borrowed the money to pay for his alcohol treatment in the amount of $8,300 from his father, who expects to be

repaid.

The student loan balance as of February 10, 2004 was the principal amount of $121,742.90, with unpaid interest of $7,232.22, for a total of $128,975. The annual interest rate is fixed at 9%. In the fall of 2003, the monthly payment on the student loan was at least $825.30. The record does not contain evidence of the amortization period. However, the Court's own calculations indicate a payment period in excess of 40 years. The present loan is a consolidation of multiple loans which were originated from 1986 through 2000. A substantial amount of principal was paid prepetition. The borrowings were made for the education of the Debtor's three children and Debtor's doctoral work, which was not completed. At the time of filing for Chapter 7 relief, the student loan were current. Payments were made using a portion of the proceeds from the sale of the home after Debtor lost his employment. The Debtor does not have sufficient income to make the monthly payment.

Debtor is eligible to participate in the Ford Program Income Contingent Repay Plan (ICRP). Under this plan, the Debtor's monthly loan payment would be adjusted annually based upon his total adjusted gross income for the prior year. Based upon Debtor's monthly gross income $1,918.36 from KPERS and his family size of two, his monthly payment would be $181.67 for a term of 300 months (25 years), based upon interest at 8.25%. If the Debtor's adjusted gross income were to increase to $30,000, his payments would be $298 for a term of 300 months (25 years). The Debtor has not elected to participate in this plan because he is not able to make the $187 per month payment.

DISCUSSION AND CONCLUSIONS OF LAW.

Section 523(a)(8) provides that a discharge under section 727 does not discharge an individual from a debt for an educational loan made, insured, or guaranteed by a governmental unit "unless

excepting such debt from discharge under this paragraph will have an undue hardship on the debtor and the debtor's dependants."[13] The section is self-executing, and "[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt."[14] Here, the Debtor has filed a dischargeability complaint, and it is undisputed that the loans in issue are student loans for the purposes of section 523(a)(8).

"Undue hardship" is not defined by the Bankruptcy Code. In this circuit, the standard for "undue hardship" requires satisfaction of the three-part test adopted by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*,[15] as interpreted by the Tenth Circuit in *Educational Credit Management Corporation v. Polleys.*[16] In *Brunner*, the Court stated the required three-part showing as follows:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[17]

Each of the three parts must be satisfied before the debtor is entitled to discharge the student loan.[18] The Tenth Circuit's adoption of the *Brunner* framework included the following caveat:

---

[13] 11 U.S.C.A § 523(a)(8).

[14] *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 1912, 158 L. Ed.2d 764 (2004).

[15] 831 F.2d 395 (2d Cir. 1987) (hereinafter "*Brunner*").

[16] 356 F.3d 1302 (10th Cir. 2004) (hereinafter "*Polleys*").

[17] *Brunner*, 831 F.2d at 396.

[18] *Polleys*, 356 F.3d at 1307.

> We therefore join the majority of the other circuits in adopting the *Brunner* framework. However, to better advance the Bankruptcy Code's "fresh start" policy, and to provide judges with the discretion to weigh all the relevant considerations, the terms of the test must be applied such that debtors who truly cannot afford to repay their loans may have their loans and discharged. Additionally, we think that the good-faith portion of the *Brunner* test should consider whether the debtor is acting in good faith in seeking the discharge, or whether he is intentionally creating his hardship.[19]

The Court will now apply each of the three standards to the facts of this case, but, before doing so, pauses to consider the nature and purposes of student loans and the policy of restricting discharge. One court has described the student loan program as follows:

> The guaranteed student loan program offers loans without regard to the borrower's credit worthiness. As such, student loans are a great benefit to those who would not ordinarily qualify for a loan otherwise. The student loan represents an investment in the borrower's future ability to generate income. Consequently, there is an expected likelihood of changed circumstances based on educational training – that is the borrower will obtain employment with income sufficient to repay his student loan obligations.
>
> However, this is not always the case. Oftentimes, through no fault of the borrower, he is unable to generate the expected income.[20]

Section 523(a)(8) was recommended because of a "rising incidence of consumer bankruptcies of former students motivated primarily to avoid payment of educational loan debts."[21] Allowing the discharge of student loan obligations by recent graduates who had a substantial earning potential but little or no nonexempt assets would contravene the general policy that a loan that "enables a person to

---

[19] *Id*. at 1309.

[20] *Speer v. Educ. Credit Mgmt. Corp. (In re Speer)*, 272 B.R. 186, 192 (Bankr. W.D. Tex. 2001).

[21] *Polleys*, 356 F.3d at 1306 (quoting Report of the Comm'n on Bankr. Laws of the United States, H.R. Doc. No. 93-137, Pt. II § 4-506 (1973)).

earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt."[22] The undue hardship standard promotes this purpose. It is deprives student loan borrowers of discharge when the facts and circumstances show that the loan enabled the debtor to earn greater income which can be dedicated to the repayment of the student loan while a minimal standard of living is maintained. On the other hand, in those situations where notwithstanding the additional education and the absence of fault of the borrower, the debtor can not both pay the loan and maintain a minimal standard of living, the availability of discharge is consistent with the public policy.

A. Can Debtor maintain a minimal standard of living while repaying the consolidated student loan debt?

ECMC does not seriously challenge satisfaction of the first element of the *Brunner* test.[23] As found above, Debtor's only reliable income at the time of the hearing was approximately $1,731.36 per month from KPERS, and his monthly expenses, without any payment of approximately $825 monthly student loan obligation, were approximately $1,976.05. The budget includes only $12.50 per month for medical and dental expenses not covered by insurance. If this estimate of expenses is amended to reduce the cost of gasoline from $233.26 to $100.00, expenses still exceed income. If this estimate of expenses were further reduced to reflect the facts that at the time of trial Debtor was unable to purchase health insurance and the bank loans would be paid in the near future, the Debtor would still be unable to make the full monthly student loan payment, partially because the sums not paid for health

---

[22] *Id*.

[23] See, however, ECMC's arguments regarding the Ford Program, which are discussed below.

insurance would be needed for Debtor's out of pocket health care costs.

All of the Debtor's expenses were satisfactorily explained. Debtor's life style is anything but extravagant. Debtor moved from a home in Circleville which sold for $138,500 to a 1971 mobile home which he purchased for $5,000. The Debtor's and his wife's vehicles are old. There are no frivolous expenses; there is even no cushion for emergency expenses.

Under the circumstances which existed at the time of trial, Debtor's expenses could not be reduced by $825, as would be required for him to make payment on the consolidated student loan. The Court finds the first *Brunner* element satisfied.

B. Is Debtor's state of affairs likely to persist for a significant portion of the repayment period of the consolidated student loan?

The second *Brunner* element "requires that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans."[24] The Tenth Circuit in *Polleys* described application of this prong as follows:

> However, in applying this prong, courts need not require a "certainty of hopelessness." Instead, a realistic look must be made into debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like. Importantly, "courts should base their estimation of the debtor's prospects on specific articulable facts, not unfounded optimism," and the inquiry into future circumstances should be limited to the foreseeable future, at most over the term of the loan.[25]

The Court finds that the evidence establishes that Debtor's state of affairs is likely to persist for a significant portion of the repayment period. It is unlikely that Debtor's monthly income from his

---

[24] *Id.* at 1310.

[25] *Id.* (quoting Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Education Loans?*, 71 Tul. L. Rev. 139, 197 (1996)).

employment will increase by $825 in the foreseeable future. Debtor's rehabilitation from his alcohol addiction is a concern. Further, although Debtor has earned bachelor and master degrees and has completed a part of his doctoral requirements and is certified by the State of Kansas to teach all grade levels, to be a district administrator and to be a building administrator, there is convincing evidence that Debtor will not be able to find full-time employment in public education. Debtor's most likely employment in education is as a substitute teacher. Debtor's efforts to find full time employment in other endeavors within driving distance of his home have been unsuccessful; he has been able to obtain work only in temporary positions. The Court heard no evidence that this situation is likely to change. Even if Debtor's wife returns to the labor market, given her age and education, she would contribute to the family income only for a few years at a low rate of pay. Debtor's opportunities for employment certainly are circumscribed by his decision to live in Geneseo, but this is a life choice made by the Debtor.[26] Given the record in this case, a finding that the second element of *Brunner* is not satisfied because of the likelihood of Debtor's increased income from wages would be speculation and not based upon "specific articulable facts."[27]

In contrast to the likelihood of an increase in income from employment, the record does support a finding that Debtor will be eligible to receive Social Security before the student loan would be repaid.[28] The earliest date on which Debtor could elect to start receiving benefits is age 62, approximately 5

---

[26] Courts in the Tenth Circuit have been cautioned not to impose their own values on a debtor's life choices. *Id*. at 1310.

[27] *Id.*

[28] The record does not include the term of the consolidated student loan under the current repayment schedule. The Court's own all calculations indicate that the term is in excess of 40 years, when Debtor would be 97 years old.

years after the hearing. At Debtor's election, the commencement of social security payments could be delayed for eight years, until age 70. If the early election is made, the benefits would be approximately $1323 a month. The amount, of course, would increase if Debtor elects to not draw his benefits until a later time.

The Court finds Debtor's entitlement to Social Security benefits in the future is not sufficient to hold that the second element of the *Brunner* test is not satisfied. As found above, there is no evidence to suggest that Debtor could make the $825 monthly payment between the date of the hearing and the commencement of receipt of Social Security benefits. During that time, interest would continue to accrue, thereby increasing the debt. The Court finds that expenses in addition to those included in the Debtor's present budget will be incurred as Debtor and his wife age. The amount of the budget devoted to medical expenses can not be sufficient to cover the medical expenses in the long term. Debtor's wife will need to replace her old vehicle. The Debtor will undoubtedly have a significant increase in housing costs at some point in the future. Even if the Debtor were to commence making payments of $825 a month when he started drawing Social Security benefits, a significant portion of the debt could not be paid down during his remaining lifetime. "The burden of a debt which can never realistically be repaid constitutes an undue hardship." [29]

The Court holds that the second *Brunner* element is satisfied with respect to the consolidated student loan which requires a monthly payment of $825.

C. Good faith.

The third prong of the *Brunner* test requires the Court to evaluate the Debtor's good faith. The

[29] *Coats v. New Jersey Higher Educ. Assistance Auth.* (*In re Coats*), 214 B.R. 397, 403 (Bankr. N.D. Okla. 1997).

Tenth Circuit in *Polleys* defined the inquiry as follows:

> Finally, an inquiry into a debtor's good faith should focus on questions surrounding the legitimacy of the basis for seeking a discharge. For instance, a debtor who willfully contrives hardship in order to discharge student loans should be deemed to be acting in bad faith. Good faith, however, should not be used as a means for courts to impose their own values on a debtor's life choices.[30]

Good faith can be evidenced by the fact that the debtor did not immediately seek to discharge his student loan obligations when they became due and cooperation with the lenders.[31] Additional evidence of good faith is a showing that the debtor is "actively minimizing current household living expenses", is "maximizing personal and professional resources", and is not "attempting to abuse the student loan system by having [debtor's] loans forgiven before embarking on lucrative careers".[32]

The evidence in this case establishes the presence of good faith. Debtor did not immediately seek to his discharge loan. A substantial portion of the principal was paid prepetition. The Debtor continued to make payments on the student loan even after he lost his job with the USD 337. In fact, Debtor was current on his payments when the bankruptcy was filed because some of the proceeds from the sale of the Debtor's house in Circleville were applied to the loan. Debtor's significant change in income and lifestyle were independent of his obligation for the student loan. Debtor made application for numerous jobs in education but could not find employment. Since moving to Geneosa, Debtor has been looking for employment but was able to find only temporary work. Although Debtor's prospects for employment might be enhanced if he were to move from Geneosa, Debtor has a sound reasons for

---

[30] *Polleys*, 356 F.3d at 1310.

[31] *Id*. at 1311-12.

[32] *Id.* at 1312.

making the choice of Geneosa as his home. The Court has been cautioned not to second-guess a debtor's life choices.[33] Further, the hardship discharge operates to protect both the Debtor and his dependants. Moving would impose a severe hardship upon Debtor's wife and her elderly parents, for whom she provides constant care.

The Court finds that the third element of the *Brunner* test is satisfied as to the consolidated student loan.

FORD PROGRAM.

ECMC argues that the good-faith standard, as well as the first and second elements of the *Brunner* test, are not satisfied because Debtor is eligible to participate in the Ford Program Income Contingent Repayment Plan ("ICRP") under which Debtor's payments based upon his income at the time of trial would be $181.67 for a term of 25 years. Debtor has declined to participate in the plan because he does not currently have $181.67 which he can use for payments on the student loan.

The requirements for an ICRP are prescribed by 34 C.F.R. § 685.209. The amount of the monthly payment is calculated based upon the borrower's adjusted gross income determined from the tax returns, the total amount borrowed, and family size. The calculation of the payment amount has been described as follows:

> How does an ICRP work? The amount of the monthly payment under an ICRP is calculated based on the borrower's adjusted gross income (AGI) determined from the debtor's tax returns, total amount borrowed and family size. The monthly payment is calculated to be *the lesser* of the amount that would be paid if the borrower repaid the loan in 12 years, multiplied by an annual income percentage factor that varies based on the borrower's annual AGI, or 20 percent of the borrower's

[33] *Id*. at 1310.

> discretionary income. Discretionary income is defined as the borrower's AGI minus the poverty level for the borrower's family size. . . . The payment may be adjusted annually depending on changes to the AGI reported on the debtor's tax return for the preceding year and that national poverty level. The combined income of a married couple.[34]

As stated above, ECMC offered evidence that under the ICRP, Debtor's initial plan payments would be $181.67 for a term of 25 years based upon his gross income of $1,918.36. If the Debtor's annual adjusted gross income were to increase to $30,000, his ICRP payment would be $298 for a term of 25 years.

Although on the surface an IRCP is an appealing solution to the payment of student loans, there are severe problems with such a plan in this case. Both the payment amounts proposed under Debtor's circumstances at the time of trial and based upon the future possibility of $30,000 adjusted gross income are insufficient to service even the interest on Debtor's loan at the revised proposed rate of 8.25% per annum. In other words, there would be negative amortization for the foreseeable future. If Debtor were fortunate to live for the full 25 year loan term, the remaining balance would be forgiven, but this would result in taxable debt forgiveness income. Debtor's participation in a proposed plan would not constitute payment of the student loan.

The Court holds that Debtor's failure to agree to participate in the ICRP does not evidence the absence of good faith. Debtor testified that he is unable to make even a minimal payment calculated under the ICRP based upon his current income. Even if Debtor could make the payment, given the ineffectiveness of the ICRP as a vehicle to satisfy the Debtor's student loan, it is reasonable for him to decline to participate. "A rejection of the income contingent repayment plan is not, in and of itself,

---

[34] Thomas J. Yerbich, *Student Loan Income Contingent Repayment Plans: An Alternative?,* 24 Am. Bankr. Inst. J. 8 (2005) (emphasis added).

sufficient to show lack of good faith on the part of the Debtor."[35] There is ample additional evidence of good faith.

This Court also rejects ECMC's suggestion that the Debtor's decision not to participate in an ICRP evidences that the Debtor has not satisfied the first two *Brunner* factors which examine the Debtor's present and future ability to make loan payments. ECMC argues that because payments under the plan would be adjusted based upon the Debtor's income with regard to the poverty standard, the Debtor would always be able to afford the payments while maintaining a minimal standard of living. Other courts have identified the flaws in this position. "[T]he availability of the ICRP cannot be a magic wand that when waived precludes discharge of a student loan debt."[36] *In re Strand*[37] rejected the argument that a hardship discharge could not be granted when the debtor could participate in an ICRP because there would never be an occasion where the repayment obligation would constitute an undue hardship, since the payments would be directly tied to income and could even be reduced to zero.[38] As to the detriment from participation in the plan, the court stated as follows:

> Even, or indeed especially, in the event of a debtor's fruitless zero-payment-required participation in such an income contingent repayment program, the derivative financial woes would be significant with interest accruing for twenty five years, and very little or absolutely no payment

---

[35] *Norris v. Educ. Credit Mgmt. Corp.* (*In re Quarles*), 2004 WL 2191608, _____ (Bankr. D. Kan. Apr. 22, 2004) (citing *In Re Swinney*, 266 B.R. 800, 806 (Bankr. N. D. Ohio 2001)); *see Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495, 507 (10th Cir. BAP 2004).

[36] *Durrani v. Educ. Credit Mgmt. Corp*. (*In re Durrrani*), 311 B.R. 496, 506 (Bankr. N.D. Ill. 2004), aff'd 320 B.R. 357 (D.N.D. Ill. 2005).

[37] *Strand v. Sallie Mae Servicing Corp*. (*In re Strand*), 298 B.R. 367 (Bankr. D. Minn. 2003).

[38] *Id*. at 375.

> against the principal, [debtor] would be hamstrung into poverty for the rest of his life. He would be precluded from obtaining any credit, and perhaps even from obtaining approval of a rental application. He would grow hopelessly more insolvent, with no realistic possibility of ever retiring the debt. Finally, at the age of 79, the debt would be forgiven and he would be assessed at an enormous income tax liability, probably nondischargeable in bankruptcy. "The loans would haunt him for twenty five years and then create an income liability he could not pay." [39]

In *In re Fahrer*,[40] the court found that a 53 year-old Chapter 7 debtor was entitled to an undue hardship discharge on her more than $180,000 in student loan debt despite her eligibility for and conscious decision not to participate in an ICRP. The court stated:

> The Court must consider the consequences of Debtor's potential participation in the ICRP and the efficacy of that relief under the circumstances. In this case, the Debtor owes approximately $180,000, a staggering sum of money. Given the Debtor's past, present and the likely future income and expenses, there is little doubt that she would have to be in the program for the full 25 years, still not pay the entire amount, then receive a discharge of the unpaid balance and face taxable income in that amount. At that point, the Debtor would be 78 years old. The age of the Debtor is a factor the Court may take into consideration in assessing whether repayment of the debt constitutes an undue hardship. . . . This Court agrees with the observation in *Brown* that requiring a debtor to participate in an extended repayment plan, which significantly exceeds the debtor's working life constitutes an undue hardship.[41]

In *In re Williams*,[42] the age of the debtors, 53 and 54 years old, and the amount of student loan debt, nearly $200,000, were factors in the court's holding that the debtor's failure to participate in the ICRP

---

[39] *Id*. at 376-77, quoting *Korhonen v. Educ. Credit Mgmt. Corp*. (*In re Korhonen*), 296 B.R. 492, 497 (Bankr. D. Minn. 2003).

[40] *Fahrer v. Sallie Mae Serv. Corp*. (*In re Fahrer*), 308 B.R. 27 (Bankr. W.D. Mo. 2004)

[41] *Id*. at 35.

[42] *Williams v. Educ. Credit Mgmt. Corp*. (*In re Williams*), 301 B.R. 62 (Bankr. N.D. Cal. 2003).

did not preclude an undue hardship discharge. The court reasoned that the debtors' payment under the plan would not be sufficient to service the interest on the loans and under the current law would have resulted in taxable income of from $300,000 to $400,000 for the debtors upon forgiveness of the loans on the eve of their 80th birthdays.[43]

For the foregoing reasons, the Court rejects ECMC's argument that the Debtor has not has satisfied his burden to prove the presence of each of the three *Brunner* elements required for an undue hardship discharge of his student loan in the amount of $121,742.90 principal, plus interest because of his failure to participate in a Ford Program IRCP.

PARTIAL DISCHARGE.

The foregoing constitutes a finding that the Debtor's repayment of the entire student loan debt would be an undue hardship. However, under the circumstances presented, the Court is convinced that payment of part of the student loan debt would not constitute an undue hardship; the first and second *Brunner* elements would not be satified if the debt were significantly lower. The Court therefore proceeds to examine whether it has the authority to fashion a remedy discharging the Debtor from a portion of the student loan, but holding that there would be no undue hardship if he were required to pay the remainder.

There is a split among the courts concerning the authority of a bankruptcy court to order a partial discharge as a remedy under section 523(a)(8). Some courts take a strict view of the code and hold that a debt is either wholly dischargeable or wholly non-dischargeable.[44] Other courts interpret

---

[43] *Id.* at 78-79.

[44] *E.g., Skaggs v. Great Lakes Higher Educ. Corp.* (*In re Skaggs*), 196 B.R. 865 (Bankr. W.D. Okla. 1996).

section 523 (a)(8) more flexibly in light of equitable powers that have been granted to bankruptcy courts and to serve the broader policy rationale of the Code.[45] The 6th[46], 9th[47], and 11th[48] Circuits have each held that a partial discharge is appropriate when there is a finding of undue hardship with respect to a portion of the student loan debt. The issue has not been decided in the 10th Circuit. In 1982, Judge Franklin, although noting that most courts had made an all or nothing finding under section 523(a)(8), chose to follow the few courts who had reduced the amount of the loan or revises the payment schedule.[49] In 1996, the bankruptcy courts in Oklahoma reached conflicting conclusions.[50] In 1998, the 10th Circuit BAP, in a case holding that the order confirming a Chapter 13 plan which discharged part of a student loan was res judicata, identified the strict view as the majority position.[51] In 2004, the 10th

---

[45] *E.g.*, *Hornsby v. Tennessee Student Assistance Corp.* (*In re Hornsby*), 144 F.3d 433 (6th Cir. 1998).

[46] *Miller v. Pennsylvania Higher Educ. Assistance Agency*, 377 F.3d 616, 622 (6th Cir. 2004) (holding that "the requirement of undue hardship must always apply to the discharge of student loans in bankruptcy – regardless of whether a court is discharging a debtor's student loans in full or only partially.")

[47] *Saxman v. Educ. Credit Mgmt. Corp*. (*In re Saxman*), 325 F.3d 1168, 1174 (9th Cir. 2003) (holding that a "debtor who wishes to obtain the discharge of his student loans must therefore meet the requirements of § 523(a)(8) as to the portion of the debt to be discharged before that portion of his or her debt can be discharged.")

[48] *Cox v. Heman Ins. Corp. of America* (*In re Cox*), 338 F.3d 1238, 1242 (11th Cir. 2003) (holding partial discharge of a student loan indebtedness is possible upon the finding of undue hardship).

[49] *United States of America v. Brown* (*In re Brown*), 18 B.R. 219 (Bankr. D. Kan. 1982).

[50] *Compare In re Skaggs*, 196 B.R. at 865 *with Heckathorn v. United States of America ex rel. United States Dept. of Educ.* (*In re Heckathorn*), 199 B.R. 188 (Bankr. N.D. Okla. 1996) *and Griffin Corp. v. EDUSERV* (*In re Griffin*), 197 B.R. 144 (Bankr. E.D. Okla. 1996).

[51] *Anderson v. Higher Educ. Assistance Found.* (*In re Anderson*), 215 B.R. 792, 795 (10th Cir. BAP 1998) aff'd. 179 F.3d 1253 (10th Cir. 1999).

Circuit BAP[52] decided an appeal from New Mexico in which the bankruptcy court had granted the debtors a partial discharge of all but the principal amount of the student loan. The student loan creditors appealed. The court reversed the bankruptcy court's finding that the second and third *Brunner* factors had not been satisfied, held that the entire debt should have been discharged, but affirmed the partial discharge because the debtors had not cross appealed. Although the BAP did not discuss partial discharge, the court's affirming an order of partial discharge indicates possible support for the more flexible point of view.

This Court finds the reasoning of decisions which hold that the Code permits partial discharge of a student loan debt based upon undue hardship to be convincing and holds that a partial discharge is permissible under section 523(a)(8). The words "undue hardship" suggest a matter of degree, not all or nothing.[53] The burden of payment of an entire student loan may constitute an undue hardship, but that burden may become bearable if the obligation is reduced. The Sixth Circuit's *Hornsby* decision is a leading case permitting partial discharge, although the *Hornsby* court placed more reliance on the authority of section 105 than this Court views to be necessary.[54] The United States District Court for the Southern District of California when finding authority for partial discharge focused most of its analysis on section 523. It rejected the contention that the plain reading of section 523 implies that only the

---

[52] *Alderete v. Educ. Credit Mgmt. Corp*. (*In re Alderete*), 308 B.R. 495 (10th Cir. BAP 2004).

[53] *In re Heckathorn*, 199 B.R. at 195.

[54] *In re Hornsby*, 144 F.3d at 433. The 6th Circuit now requires a finding of undue hardship with regard to the amount discharged. *In re Miller,* 377 F.3d at 622.

entire debt can be discharged for undue hardship.[55] It adopted the reasoning urged by the lender:

> [T]hat a partial discharge is the most logical and appropriate path to take. . . because a full discharge would go against the Congressional intent of section 523(a)(8): "[t]o use an all our nothing approach has the effect of rendering a large debt more likely of discharge, and rewarding irresponsible borrowing, neither of which can be presumed to be part of congressional intent." A vast body of authority supports this view. These courts have generally concluded that the language of section 523(a)(8) is ambiguous and have therefore relied on congressional intent and the equitable powers of the bankruptcy courts to allow partial discharge. To this end, the Supreme Court has noted that when a "little literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, ... [then] [i]n such cases, the intention of the drafters, rather than the strict language, controls.
>
> Because the language of section 523(a)(8) is ambiguous, the Court is persuaded by *Hornsby,* where the Sixth Circuit held that a bankruptcy court has the authority to partially discharge a debtor's student loan by virtue of 11 U.S.C. § 105(a). [56]

A law review comment summarizes some of the arguments that section 523(a)(8) supports partial discharge as follows:

> [T]he "all-or-nothing rule would in some cases result in insufficient repayment, in others in insufficient discharge, regardless of the debtor's particular circumstances. . . . ."
>
> Conversely, a partial discharge would allow a court to protect educational lenders by requiring the debtor pay off at least a portion of the loan. At the same time, the debtor is alleviated from debt which the court foresees that she will not be able to repay in the future, assuming other options short of discharge are not feasible. As such, a partial discharge gives force to the dual purpose underpinning § 523(a)(8) and the "undue hardship" exception: protecting educational loans and providing for a fresh start.

---

[55] *Brown v. Great Lakes Higher Educ. Corp*. (*In re Brown*), 239 B.R. 204, 210 (D.S. D. Cal. 1999).

[56] *Id*. at 211-12.

> Furthermore, an analysis determining how much of a discharge is needed to relieve an undue hardship is consistent with the court's role in a closely evaluating the debtor's financial situation during a discharge proceeding. Thus, an argument buttressing the all our nothing interpretation because it is an easier to apply bright-line rule disintegrates when placed in the reality of this type of bankruptcy proceeding. . . . Thus, a partial discharge is not only with the court's statutory power but also feasible for a bankruptcy court to determine.[57]

For the forgoing reasons, the Court finds that partial discharge is permitted by Code and is consistent with the overall policies relating to student loan discharge. In this case, although it would constitute to an undue hardship to except the entire student loan from discharge, the evidence before the Court evidences the Debtor's present and future ability to pay a portion of the student loan debt while maintaining a minimal standard of living for himself and his dependent. As found above, the Debtor's obligation to pay principal and interest on at least part of the bank loan will be fully satisfied in the near future. This will allow the Debtor to pay the amount budgeted for the bank loan, up to $143.26 monthly, to the repayment of the student loan with no impact upon his standard of living. Further, given all the circumstances, including the possibility that the Debtor will find some work in the near future, the Court holds that the Debtor without undue hardship can make student loan payments of approximately $200 per month. Although it would constitute undue hardship for the Debtor to be required to make such payments for the full 25 years proposed by ECMC pursuant to the ICRP, the Court holds that the Debtor will be able to make payments for seven years without an undue hardship. The payment of $204.26 per month for seven years will be sufficient to amortize a debt of $13,000 at the Ford Program rate of 8.25%.

---

[57] Brendan Hennessy, *The Partial Discharge of Student Loans: Breaking Apart the All or Nothing Interpretation of 11 U.S.C. § 523(a)(8),* 77 Temp. L. Rev. 71, 88–89 (2004) (citations omitted.).

The Court accordingly holds that Debtor's student loan obligation in excess of $13,000 is discharged because of undue hardship within the meaning of section 523(a)(8). Debtor is not discharged from his obligation to pay $13,000 with interest at 8.25%, commencing on the date judgment is entered.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and the Federal Rule of Civil Procedure 58.

###