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Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases

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DISCHARGE OR NO DISCHARGE? AN OVERVIEW OF EIGHTH CIRCUIT JURISPRUDENCE IN STUDENT LOAN DISCHARGE CASES

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(1) Facts: Thirty-three-year-old unlicensed lawyer, no dependents. $100,000 in student loan debt. Learning disability since third grade. Earns $14,000 per year as construction worker.[1]

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1. Educ. Credit Mgmt. Corp. v. Mason (*In re* Mason), 464 F.3d 878 (9th Cir. 2006).

(2) Facts: Forty-three-year-old practicing lawyer, noncustodial parent of two dependents. $350,000 in student loan debt. Recovering alcoholic. Earns $48,000 per year as contract lawyer.[2]

(3) Facts: Thirty-nine-year-old licensed lawyer, married. $142,000 in student loan debt. Clinically depressed since teen-age years. Earns $30,000 per year as secretary/receptionist. Household income of $59,000.[3]

(4) Facts: Married couple, late thirties, one dependent. $120,000 in combined student loan debt. Wife is middle school music teacher, no disability. Husband is unemployed and suffers from narcolepsy, obesity, chronic obstructive pulmonary disease. Household income of $38,000 per year.[4]

(5) Facts: Forty-six-year-old single mother, one dependent. Part-time legal secretary earning $20,000 per year. History of psychiatric problems. More than $52,000 in student loan debt.[5]

These debtors have one thing in common: all had their student loan debt discharged by a bankruptcy court. On appeal, however, all but one had the discharge reversed by a circuit court. Which one and why?

I. INTRODUCTION

As history has shown, a well-educated society is critical to our general welfare and prosperity.[6]

With ever-rising college costs, student loans have become a necessity of life for most, and many emerge from college or graduate programs with student loan debt that rivals a home mortgage.[7] Although

2. Educ. Credit Mgmt. Corp. v. Jesperson (*In re* Jesperson), 571 F.3d 775 (8th Cir. 2009).

3. Educ. Credit Mgmt. Corp. v. Reynolds (*In re* Reynolds), 425 F.3d 526 (8th Cir. 2005), *cert. denied* 549 U.S. 811 (2006).

4. Educ. Credit Mgmt. Corp. v. Mosko (*In re* Mosko), 515 F.3d 319 (4th Cir. 2008).

5. Brightful v. Pa. Higher Educ. Assistance Agency (*In re* Brightful), 267 F.3d 324 (3d Cir. 2001).

6. Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399 (4th Cir. 2005).

7. FinAid, http://www.finaid.org/loans/ (last visited Mar. 14, 2010). The average cumulative debt for a four-year undergraduate degree is $22,656. *Id.* Graduate and professional degrees add, on average, an additional $30,000 to $120,000 to the undergraduate debt. *Id.* The largest debt the authors have encountered was more

federal student loans are a boon to achieving educational success, their repayment often seems the bane of life ever after. To protect the federal student loan program, Congress deemed student loan debt nondischargeable in bankruptcy except in very rare circumstances.[8] Over the last three decades, Congress has increasingly narrowed the bases on which debtors may discharge their loans in bankruptcy.[9] As of October 8, 1998, the only way debtors may discharge

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than $700,000 and consisted of federal and private student loan debt. Blackbird v. Wachovia Bank, No. 07-4039, slip op. at 13 (Bankr. W.D. Wash. Nov. 30, 2007). In *Blackbird*, the bankruptcy court discharged all but $45,000 in private loan debt of this balance. *Id.* at 18. Only the Educational Credit Management Corporation (ECMC) appealed to the Ninth Circuit Bankruptcy Appellate Panel (BAP). The BAP reversed the bankruptcy court's discharge of Blackbird's federal student loan debt, which by this time had grown to nearly $240,000. Educ. Credit Mgmt. Corp. v. Blackbird, No. 07-1454-KJuKu, slip op. at 8 n.10 (B.A.P. 9th Cir. July 11, 2008), *judgment amended by* No. 07-1454-KJuKu (B.A.P. 9th Cir. July 14, 2008) (correcting the erroneous statement of the July 11 judgment that the bankruptcy court's decision had been affirmed).

8. *See Frushour*, 433 F.3d at 399.

9. *See* Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 449 (2004); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1243 (11th Cir. 2003) ("Considering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness.").

The first federal student loan program began in 1958 with the National Defense Education Act of 1958. National Defense Education Act of 1958, Pub. L. No. 85-864, §§ 201–09, 72 Stat. 1580, 1583–87 (1958) (enacted) (establishing the Perkins Loan program). The Higher Education Act followed in 1965, creating the Guaranteed Student Loan Program (n/k/a the Federal Family Education Loan Program (FFELP)). Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (enacted).

Until 1977, borrowers could discharge their student loan debt, like any other unsecured debt, in bankruptcy. *See* 11 U.S.C. § 35 (1976). Even then, the discharge exception only applied to Chapter 7 bankruptcies. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2590-91 (1978) (enacted). Under this law, borrowers could request a discharge by showing that (1) "the loan first became due before five years . . . before the date of the filing of the petition," 11 U.S.C. § 523(a)(8)(A) (1989), or (2) "excepting such debt from discharge . . . [would] impose an undue hardship on the debtor and the debtor's dependents." *Id.* § 523(a)(8)(B) (2007).

In 1990, in reaction to debtors who were using Chapter 13 to discharge their student loan debt without making substantial and meaningful payments, Congress extended the discharge exception to Chapter 13 bankruptcies. Student Loan Default Prevention Initiative Act of 1990, Pub. L. 101-508, § 3007(b), 104 Stat. 1388-28 (1990) (enacted). Shortly thereafter, Congress increased the five-year discharge provision of § 523(a)(8)(A) to seven years. Pub. L. 101-647, § 3621(1)–(2), 104 Stat. 4964–4965 (1990) (enacted). Then, in 1998, Congress eliminated a time-based basis for discharge altogether, leaving undue hardship as the only basis to discharge student loan debt in bankruptcy. Higher Education Amendments of 1998, Pub. L. 105-244, § 971(a), 112 Stat. 1837 (1998).

Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Congress expanded the types of loans that fall under § 523(a)(8).

student loan debt in bankruptcy is to prove that repayment would be an undue hardship.[10] But in carving out this exception to general discharge, Congress left the definition of "undue hardship" up to the courts.

Although Congress created one legal standard for student loan discharge, two tests have emerged to aid bankruptcy courts in deciding whether debtors have met the legal standard of undue hardship. Nine out of eleven circuits use the *Brunner* test, which originated in the Second Circuit in 1987.[11] Only the Eighth Circuit has formally rejected the *Brunner* test, preferring instead a "less restrictive" "totality of the circumstances" test (totality-of-the-circumstances test).[12] The existence of two different tests has sometimes produced disparate results among the circuits. In its recent *Educational Credit Management Corp. v. Jesperson* decision, however, the Eighth Circuit seems to have signaled a change—a yellow light, so to speak—that it is tightening up its "less restrictive" totality-of-the-circumstances test.[13]

This article will analyze the evolution of student loan discharge jurisprudence in the Eighth Circuit and will consider whether *Jesperson* signals that the Eighth Circuit is aligning itself with the majority of other circuits.

II. WHY CAN'T I DISCHARGE MY STUDENT LOANS IN BANKRUPTCY?

The short answer is you can, but the road is long and Congress intended for the hurdles to be exceptionally difficult. The policy rea-

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See 11 U.S.C. § 523(a)(8)(B) (2006) (including "any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual"). Under this amendment, non-federally backed loans enjoyed the presumption of non-dischargeability under the bankruptcy code.

10. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998) (enacted).

11. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987). The other circuits followed. *See, e.g.*, Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 385 (6th Cir. 2005); *Frushour*, 433 F.3d at 400; Educ. Credit Mgmt. Corp. v. Polleys (*In re* Polleys), 356 F.3d 1302, 1309 (10th Cir. 2004); *Cox*, 338 F.3d at 1238; U.S. Dep't of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108, 1112 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298, 305–06 (3d Cir. 1995); *In re* Roberson, 999 F.2d 1132, 1136–37 (7th Cir. 1993).

12. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003); *see also* Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 840 (Bankr. D. Minn. 2004).

13. Educ. Credit Mgmt. Corp. v. Jesperson (*In re* Jesperson), 571 F.3d 775, 779 (8th Cir. 2009).

sons for this high bar are twofold: to "prevent[] abuses of the educational loan system" and "to safeguard[] the financial integrity of governmental entities and nonprofit institutions" in the federal student loan program.[14] The federally insured student loan program "serves valuable purposes. It affords individuals in all walks of life the opportunity to obtain an education, and with it the mobility and financial stability that an education can provide."[15]

Student loans are unique obligations because the federal government loans students money without respect to their creditworthiness.[16] Thus, the taxpayers put their faith in students to repay the debt, except in "rare circumstances" and only where "a certainty of hopelessness exists."[17] And although the goal is to provide access to higher education, it is not Congress's policy to provide it for free.[18] Consequently, Congress has expressly excluded student loan debt from the general discharge provision of the bankruptcy code "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[19] Absent a showing of undue hardship, the Bankruptcy Code's "fresh start" will not include a discharge of any student loan debt.[20]

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14. 4 COLLIER ON BANKRUPTCY ¶ 523.14, at 523-101 (Lawrence P. King et al., eds., 15th ed., revised, 2007); *see also* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 754 (Bankr. S.D.N.Y. 1985).

15. *Frushour*, 433 F.3d at 399.

16. As the Tenth Circuit noted: "[S]tudent loans are enabling loans [that] allow[] individuals to improve their own human capital and increase their income potential." Educ. Credit Mgmt. Corp. v. Mersmann (*In re* Mersmann), 505 F.3d 1033, 1042 (10th Cir. 2007) (en banc) (internal quotation marks and citation omitted). Because student loans are unsecured loans—the creditor cannot seize a borrower's education in the event of a default—Congress set the bar to discharge high and then federally guaranteed the loans to ensure lender participation. *Id. See also Roberson*, 999 F.2d at 1135–36; 4 COLLIER, *supra* note 14, at 523-101.

17. *Frushour*, 433 F.3d at 401; *see also Roberson*, 999 F.2d at 1136.

18. Heckathorn v. U.S. Dep't of Educ. (*In re* Heckathorn), 199 B.R. 188, 193 (Bankr. N.D. Okla. 1996).

19. 11 U.S.C. § 523(a)(8) (2006); *see also* Pelkowski v. Ohio Student Loan Comm'n (*In re* Pelkowski), 990 F.2d 737, 743 (3d Cir. 1993); Andrews Univ. v. Merchant (*In re* Merchant), 958 F.2d 738, 742 (6th Cir. 1992) ("Congress enacted 11 U.S.C. § 523(a)(8) in an effort to prevent abuses in and protect the solvency of educational loan programs."). Accordingly, "limiting the circumstances under which student loan obligations can be discharged in bankruptcy helps preserve the financial integrity of the student loan program." *Pelkowski*, 990 F.2d at 744.

20. Grogan v. Garner, 498 U.S. 279, 286 (1991). The Supreme Court has "acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Id.* (citing Local Loan Co.

A. *What is Undue Hardship?*

1. *One Legal Standard*

The Bankruptcy Clause of the United States Constitution empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[21] The Bankruptcy Code provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> . . .
>
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution . . . .[22]

Congress did not provide a specific test or define "undue hardship," but the use of the "adjective 'undue' indicates that Congress viewed garden-variety hardships [an] insufficient excuse for a discharge of student loans."[23]

2. *Two Tests to Effect One Legal Standard*

Over the years, courts have developed several legal tests to give practical effect to the legal standard intended by Congress, but only two of these tests effectively remain: the *Brunner* test and the totality-of-the-circumstances test.

Nine circuits have adopted the *Brunner* test, formulated by the United States District Court in the Southern District of New York and

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v. Hunt, 292 U.S. 234, 244 (1934)); *see also* Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1243 (11th Cir. 2003) (stating that the "fresh start" principle does not permit judicially created exceptions to § 523(a)(8)).

21. U.S. CONST. art. I, § 8, cl. 4.

22. 11 U.S.C. § 523(a)(8)(A)(i) (2006).

23. Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985); *see also* Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 399 (4th Cir. 2005); Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001).

affirmed by the Second Circuit in 1987. The *Brunner* test requires the debtor to show

(1) an inability to maintain, based on current income and expenses, a "minimal" standard of living for the debtor and the debtor's 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";[24] and
(3) a good faith effort to repay the loans.[25]

The Eighth Circuit rejected the *Brunner* test and formally adopted the totality-of-the-circumstances test in *Long v. Educational Credit Management Corp. (In re Long).*[26] The totality-of-the-circumstances test requires courts to examine broadly the facts and circumstances bearing on the debtor's ability to pay the student loans and other relevant considerations, including

(1) the debtor's past and present financial resources, and those the debtor can reasonably rely on for the future;
(2) the reasonable necessary living expenses of the debtor and the debtor's dependents; and
(3) "any other relevant facts and circumstances surrounding each particular bankruptcy case."[27]

The First Circuit has declined to adopt either test, but most bankruptcy courts in the First Circuit apply the totality-of-the-circumstances test.[28] Under either test, the debtor bears the burden of proof by a preponderance of the evidence on all criteria for an undue hardship discharge to be granted.[29]

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24. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987)
25. *Id.*
26. 322 F.3d 549 (8th Cir. 2003).
27. *Id.* at 554–55.
28. Nash v. Conn. Student Loan Found. (*In re* Nash), 446 F.3d 188, 190-91 (1st Cir. 2006) ("We see no need in this case to pronounce our views of a preferred method of identifying a case of 'undue hardship.'"). Puerto Rico and New Hampshire bankruptcy courts apply the *Brunner* test. *See, e.g.*, Grigas v. Sallie Mae Servicing Corp. (*In re* Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000). Maine, Massachusetts, and Rhode Island bankruptcy courts apply the totality-of-the-circumstances test. *See, e.g.*, Burkhead v. United States (*In re* Burkhead), 304 B.R. 560, 565 (Bankr. D. Mass. 2004); Lamanna v. EFS Servs., Inc. (*In re* Lamanna), 285 B.R. 347, 353 (Bankr. D. R.I. 2002); Kopf v. U.S. Dep't of Educ. (*In re Kopf*), 245 B.R. 731, 739–40 (Bankr. D. Me. 2000).
29. Grogan v. Garner, 498 U.S. 279, 287 (1991).

B. *Evolution of Undue Hardship in the Eighth Circuit*

1. *The* Andrews *Analysis: "Can the Debtor Pay?"*

In 1981, the Eighth Circuit was the first circuit court to actually consider the undue hardship exception in *Andrews v. South Dakota Student Loan Assistance Corp. (In re Andrews)*.[30] Although no formal undue hardship test emerged from *Andrews*, the Eighth Circuit set forth some general principles regarding the undue hardship analysis relative to the facts of that case.[31] In construing the legal standard for undue hardship, the court focused on the debtor's ability to pay.[32] Ultimately, the Eighth Circuit declined to reach the substantive issue, holding instead that the bankruptcy court erroneously discharged the student loan debt on "an incomplete record."[33] On remand, the court instructed the lower court to consider the debtor's ability to pay after determining the debtor's reasonable living expenses against the backdrop of her present income.[34]

2. *The Totality-of-the-Circumstances Test:* In re Long

The Eighth Circuit revisited the undue hardship issue and formally adopted the totality-of-the-circumstances test more than twenty years after *Andrews*. In *Long v. Educational Credit Management Corp. (In re Long)*,[35] the Eighth Circuit rejected the *Brunner* test because it

> prefer[red] a less restrictive approach to the "undue hardship" inquiry. We are convinced that requiring our bank-

30. Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981).

31. At the time of trial, Gladys Marie Andrews was thirty-six years old, divorced, and owed about $2500 in student loan debt. *Id.* at 703. She earned an annual salary of $10,000, and her monthly student loan payment was $30. *Id.* She also had Hodgkin's Disease, which was in remission. *Id.*

32. *Id.* at 704–05. *Cf.* Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987). Under the *Brunner* test, the inability to maintain a minimal standard of living, based on current income and expenses, if forced to repay the student loans is "the minimum necessary to establish 'undue hardship.'" *Id.* (citing Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987); N.D. State Bd. of Higher Educ. v. Frech (*In re* Frech), 62 B.R. 235 (Bankr. D. Minn. 1986); Marion v. Pa. Higher Educ. Assistance Agency (*In re* Marion), 61 B.R. 815 (Bankr W.D. Pa. 1986)).

33. The record was incomplete because it contained no evidence regarding the Andrews' reasonable living expenses. *Andrews*, 661 F.2d at 703. The court "express[ed] no opinion as to the merits of the debtor's case for discharge." *Id.* at 705.

34. *Id.* at 704–05.

35. 322 F.3d 549 (8th Cir. 2003).

> ruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B). Therefore, we continue—as we first did in *Andrews*—to embrace a totality-of-the-circumstances approach to the "undue hardship" inquiry. We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.[36]

The debtor, Nanci Long, was a thirty-nine-year-old single mother who had worked as a successful chiropractor for several years before experiencing mental health issues.[37] At the time of trial, she lived with her parents and worked as a laboratory assistant at a community college earning $14,000 per year. Long's student loan debt was in excess of $60,000.[38] The bankruptcy court discounted the fact that Long had sufficient surplus income to make the required income-contingent monthly payment of fifty-four dollars and discharged her entire student loan debt, concluding:

> What [the debtor] would be faced with is a sentence of 25 years in payments on an obligation that she could never realistically expect to retire or even reduce. In all probability the obligation would continue to grow and such a situation and her best and utmost efforts is not a circumstance and situation that satisfies the test. Under those circumstances given the other difficulties that she has, the other responsibilities that she has, the other commitments that she has, that obligation in that amount which now I believe is approaching if not over $60,000.00 is unrealistic.
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> It is unrealistic. It would constitute an undue hardship and it would impose an unjustifiable burden added to these other burdens that she has and that she must overcome.[39]

On appeal, the Eighth Circuit reversed and formally adopted the totality-of-the-circumstances test for determining undue hardship.[40] Summarizing the test, it appeared that the Eighth Circuit intended

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36. *Id.* at 554 (citing *Andrews*, 661 F.2d at 704). Even though the *Long* panel stated it was reaffirming the totality-of-the-circumstances test set forth in *Andrews*, a plain reading of *Andrews* demonstrates that no particular test was established in that case. *See Andrews*, 661 F.2d at 703 (remanding the case for further fact-finding as to debtor's ability to repay the loan in light of her reasonable living expenses).

37. *Long*, 322 F.3d at 551.

38. *Id.*

39. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 271 B.R. 322, 326, 332 (B.A.P. 8th Cir. 2002) (quoting the bankruptcy court's unpublished decision), *rev'd*, 322 F.3d 549 (8th Cir. 2003).

40. *Long*, 322 F.3d at 554–55.

the totality-of-the-circumstances test's primary consideration to be the debtor's ability to pay: "Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student-loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged."[41] Less than a year later, the Minnesota bankruptcy court rejected this pecuniary approach in *Reynolds* and added a whole new dimension to the totality-of-the-circumstances test.[42]

3. Reynolds: *Non-Pecuniary Factors Trump the Ability to Pay*

In 2004, the Minnesota bankruptcy court granted the debtor, Laura Reynolds, a full discharge of student loan debt in excess of $142,000.[43] At the time of trial, Reynolds was thirty-two years old and had no dependents.[44] Despite a history of mental illness dating back to her middle school years, Reynolds obtained undergraduate and law degrees from top-tier schools.[45] She passed the Colorado bar exam on her first attempt, but never worked as an attorney.[46] At the time of trial, Reynolds was a secretary-receptionist earning roughly $30,000 per year.[47] Reynolds's husband worked as a bus driver and they

41. *Id.*

42. Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823 (Bankr. D. Minn. 2004).

43. *Id.* at 835, 840–41.

44. *Id.* at 827. Reynolds's husband had three children from a previous relationship aged fourteen, fifteen, and sixteen at the time of trial. U.S. Dep't of Educ. v. Reynolds, No. 04-1020, 2004 WL 1745835, at *1 (D. Minn. Aug. 2, 2004). Although the children did not live with Reynolds and her husband, the household income calculation included support for these children because child support was automatically deducted from the husband's paycheck. *Reynolds*, 303 B.R. at 829.

45. *Reynolds*, 303 B.R. at 827 (stating that debtor received an undergraduate degree from Claremont McKenna College and a law degree from the University of Michigan). Reynolds had been diagnosed with major depressive illness and chronic dysthymic disorder and also suffered from anxiety and panic disorders and persistent personality disorder. *Id.* at 829. In junior high, Reynolds experienced symptoms of suicidal ideation and fatigue and feelings of sadness, hopelessness, and personal isolation for about a year. *Id.* These symptoms recurred when Reynolds was in high school, but she did not receive psychiatric or psychological care. *Id.* Reynolds consulted a psychiatrist for the first time following a severe panic attack in her junior year of college and was diagnosed with agoraphobia and depression. *Id.*

46. *Id.* at 827–28. Reynolds presented expert testimony to support her position that she would never be able to qualify to practice law in Minnesota given her history of mental illness. *Id.* at 831 n.5.

47. *Id.* at 828. The bankruptcy court provided an extensive explanation to support its finding that Reynolds's mental illness precluded her from employment in the legal field, despite her educational background. *Id.* at 832 ("As a vocational matter, the Debtor simply cannot be employed in an administrative or clerical capacity at any

earned a net monthly household income of approximately $3300.[48] After paying their monthly household expenses, the couple had $700 left over.[49] This surplus was sufficient to make the $567.68 monthly payment on the federal debt under a thirty-year extended term.[50]

At trial, however, Reynolds testified that *the mere existence of the debt* was a major stressor and was detrimental to her mental health regimen.[51] The court gave significant weight to this non-pecuniary factor under the "other relevant facts and circumstances" prong of the totality-of-the-circumstances test.[52] Calling the ultimate decision "an extremely difficult call" and acknowledging Eighth Circuit precedent requiring repayment to the extent possible, the bankruptcy court afforded more weight to a non-pecuniary factor than to Reynolds's demonstrated ability to make a payment.[53] The bankruptcy court opined that subjugating Reynolds's severe mental illness to purely financial considerations would undermine *Long*'s "less restrictive" approach and thus discharged the entire $142,000 student loan debt.[54] The student loan creditors appealed and the district court affirmed, thereby putting the issue squarely back to the Eighth Circuit.[55]

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level of responsibility greater than that of office manager or administrative assistant."). *Id.*

48. *Id.* at 829.

49. *Id.* at 834.

50. *Id.* at 835. At the time of the original trial, the required monthly payment was assumed to be between $1,021.55 and $1,641.04, depending on the duration of repayment. *Id.*

51. *Id.* at 837. This position was supported by two psychiatric professionals. *Id.* at 837 n.16.

52. *Id.* at 836–37 ("If this is not one of those 'unique facts and circumstances' that play into the analysis under *Andrews* and *Long*, then nothing is.").

53. *Id.* at 837–40. The bankruptcy court also noted that Congress could have structured § 523(a)(8) to be a strict ability-to-pay consideration, similar to other provisions of the Bankruptcy Code. *Id.* at 838–39, 839 n.20. On appeal, the district court noted *Long*'s ambiguity regarding the interaction between pecuniary and non-pecuniary factors, stating "[t]he Eighth Circuit has not evaluated the relationship between the [undue hardship] test's three prongs, or discussed the balance of pecuniary versus non-pecuniary concerns that might arise in a particular bankruptcy case." U.S. Dep't of Educ. v. Reynolds, No. 04-1020, 2004 WL 1745835, at *4 (D. Minn. Aug. 2, 2004).

54. *Reynolds*, 303 B.R. at 836 n.13, 838–39; *Reynolds*, 2004 WL 1745835, at *5.

55. ECMC and the Department of Education appealed to the BAP, but the debtor elected to have the appeal heard by the district court. *Reynolds*, 303 B.R. at 823, *aff'd* 2004 WL 1745835, *aff'd*, 425 F.3d 526 (8th Cir. 2005), *cert. denied*, 549 U.S. 811 (2006). *See generally* 28 U.S.C. § 158(a)–(d) (2006) (providing district courts with appellate jurisdiction over bankruptcy court rulings and circuit courts with appellate jurisdiction over district court rulings). Two of the original five student loan creditors opted not to pursue appeal to the Eighth Circuit. Educ. Credit Mgmt. Corp. v. Reynolds (*In re* Reynolds), 425 F.3d 526, 529 (8th Cir. 2005). This significantly changed

a. The Eighth Circuit Muddies the Test.

On appeal to the Eighth Circuit, the student loan creditors relied on a single sentence from *Long* to support their position that the student loan debt was improperly discharged: "Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt—while still allowing for a minimal standard of living—then the debt should not be discharged."[56] The Eighth Circuit concluded, however, that the creditors were reading this sentence too narrowly and ignoring the very real possibility that a debtor's health and finances can be intertwined.[57] In a 2–1 decision, the Eighth Circuit agreed with the bankruptcy court that the *mere existence of the debt itself* constituted an "undue hardship" because it was a significant block to Reynolds's recovery and that eliminating the debt would mitigate her symptoms and reduce the possibility of recurring depression and compensation.[58]

In dissent, Judge William Jay Riley argued that the majority gave excessive weight to Reynoldss' mental condition.[59] The dissent noted the double treatment and circular analysis afforded Reynolds's mental illness by the majority:

> To view a serious illness other than through its effect on income and expenses borders on illogic circularity. The majority opinion makes this very mistake: it concludes having an unpaid debt contributes to Reynolds's mental illness, and mental illness contributes to the inability to repay the debt (which inability, of course, worsens the mental illness, and so on). Such an analysis grants double treatment to a debtor's illness, which is at odds with the "fairness and equity" required by the totality-of-the-circumstances test. In asking whether illness itself is an undue hardship, the majority changes this circuit's law—a change I find unwarranted in either law or policy.[60]

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the repayment requirement as the income surplus found by the bankruptcy court ($715.50) was sufficient to satisfy the required monthly payment of $502.49 owed to the remaining creditors. *Id.*

56. *Reynolds*, 425 F.3d at 532 (quoting Long v. Educ. Credit Mgmt. Corp., 322 F.3d 549, 554–55 (8th Cir. 2003)).

57. "To espouse the creditors' proposed interpretation, we would have to ignore the possibility—and in many cases reality—that a debtor's health and financial position are inextricably intertwined." *Id.*

58. *Id.* at 533.

59. *Id.* at 536–37 (Riley, J., dissenting).

60. *Id.* at 537 (citing *Long*, 322 F.3d at 554) (internal citation omitted). The dissent also compared Reynolds to the *Andrews* debtor, noting that a debtor suffering

The majority's endorsement of non-pecuniary considerations did little to clarify or guide bankruptcy courts in the Eighth Circuit. If anything, *Reynolds* muddied the test.[61]

b. Life after Reynolds

The *Reynolds* decision affected the application of the totality-of-the-circumstances test on several levels. First, *Reynolds*'s endorsement of non-pecuniary factors appeared to broaden the already amorphous totality-of-the-circumstances test, with some bankruptcy courts using *Reynolds* to justify their ever-expanding judicial discretion in undue hardship matters.[62] Several years later, the Minnesota bankruptcy court took the consideration of non-pecuniary factors even further in *In re Halverson*.[63] Halverson was sixty-five years old at the time of trial and had been married for less than two years.[64] The court noted that the greatest strain on the marriage was Halverson's student loan debt and that Halverson's *wife* suffered "physical manifestations of the stress from Halverson's enormous student loan debt."[65] The bank-

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from cancer could also be impacted by the stress of a large student loan debt. *Id.*

61. ECMC petitioned the Eighth Circuit for a panel rehearing and then a rehearing en banc. The Eighth Circuit denied the petition for rehearing en banc on a 6–5 vote. *Reynolds*, 425 F.3d 526. Thereafter, ECMC petitioned for a writ of certiorari, which was also denied. Educ. Credit Mgmt. Corp. v. Reynolds, 549 U.S. 811 (2006) (No. 05-1361).

62. *See, e.g.*, Balm v. Sallie Mae Serv. Corp. (*In re* Balm), 333 B.R. 443, 448 (Bankr. N.D. Iowa 2005) ("Stressors arising because of the debt itself may be considered with the recurring nature of an illness and the impact on not only the debtor's future health, but the debtor's financial situation."); *but see* Groves v. Citibank (*In re* Groves), 398 B.R. 673, 680 (Bankr. W.D. Mo. 2008) (concluding that the debtor's situation was factually dissimilar to that of the debtor in Reynolds). Groves testified at trial that she suffered from depression and that the existence of her "insurmountable" debt contributed to her depression. *Groves*, 398 B.R. at 679–80. The court distinguished Reynolds by focusing on the fact that Reynolds was being treated for her ailments, whereas Groves was not being treated for depression and did not take medication. *Id.* at 680–81. The court ultimately concluded that Groves failed to present evidence to establish that the existence of any debt at all was determinative of her ability to function and to work. *Id.* at 681. Despite reaching this conclusion, the court granted the debtor a partial discharge based on her financial circumstances. *Id.* at 686–88.

63. Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378 (Bankr. Minn. 2009) (holding that debtor was entitled to discharge of student loans based on a finding of undue hardship created in part by the strain of the debt itself upon debtor's marriage).

64. *Id.* at 382. Halverson and his wife were married in 2007, although the exact date is not specified. The trial was held January 6, 2009. *Id.* at 380.

65. The physical manifestations included jaw problems from grinding her teeth. *Id.* at 382.

ruptcy court surmised that the marriage would not survive if the student loan debt was not discharged.[66] Although other factors contributed to the ultimate conclusion to discharge the student loan debt, the court placed significant weight on the effects of the debt on the marriage.[67]

Some courts outside the Eighth Circuit have even followed *Reynolds*'s lead.[68] In *In re Jackson,* the Bankruptcy Court for the Southern District of New York heard an undue hardship case brought by a debtor who suffered from bi-polar disorder.[69] Despite having no expert witness to testify on his behalf regarding the effect of his condition, the court was ultimately persuaded that the stress of the student loan debt and the effect on Jackson's mental condition provided a sufficient basis to discharge the entire debt.[70]

But a different New York bankruptcy court, on very similar facts, reached the opposite result. Faced with an undue hardship case brought by a debtor suffering from depressive disorder, anxiety and panic attacks, the Bankruptcy Court for the Western District of New York, in *N.M. v. Educational Credit Management Corp. (In re N.M.),* concluded that the avoidance of stress resulting from repaying her student loan debt was an insufficient basis to grant an undue hardship discharge.[71]

Unlike *Jackson,* the *N.M.* holding stands in stark contrast to *Reynolds,* especially considering the factual parallels. Both cases involved non-practicing law school graduates with a history of mental illness, and both debtors had disposable income.[72] The Eighth Circuit's wil-

66. *Id.* at 388.

67. Such factors included the debtor's age, the size of the debt, the debtor's physical health and the debtor's future income possibilities. *Id.*

68. *See, e.g.*, Zook v. Edfinancial Corp. (*In re* Zook), No. 05-10019, 2009 WL 512436 (Bankr. D.D.C. Feb. 27, 2009) (holding debtor's psychological disorder and the debt combined constitute an undue hardship allowing debt to be discharged); Jackson v. Educ. Res. Inst. (*In re* Jackson), No. 06-01433, 2007 WL 2295585 (Bankr. S.D.N.Y. Aug. 9, 2007) (finding bipolar disorder constituted an undue hardship).

69. *Jackson,* 2007 WL 2295585.

70. *Id.* at *6–7,

71. N.M. v. Educ. Credit Mgmt. Corp. (*In re* N.M.), 325 B.R. 507 (Bankr. W.D.N.Y. 2005).

72. *See supra* notes 43–50. The debtor in *N.M.* graduated from law school in 1984 and had worked in private practice but was employed in the development office of a cultural organization at the time of trial. *N.M.*, 325 B.R at 509. The debtor in *Reynolds* had disposable household income of $700. Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 834 (Bankr. D. Minn. 2004). The court in *N.M.* never stated the exact amount of the debtor's disposable income but indicated she had sufficient income to pay the $4000 annually required towards her student loan debt. *N.M.*, 325 B.R. at 510.

lingness to accord significant weight to the non-pecuniary factors provides the only reasonable justification for these different outcomes.

Second, *Reynolds* affected the totality-of-the-circumstances test's analysis of debtors' income. Concurring specially, Judge Myron Bright said it was improper to consider *household income* in the undue hardship analysis.[73] Specifically, Judge Bright questioned the propriety of allocating all of a household's disposable income towards repayment of student loan debt incurred by only one contributing household member.[74] Judge Bright emphasized that Reynolds incurred her student loan debt prior to her marriage, and the record did not show that her husband had assumed responsibility for repayment.[75] As a result, Judge Bright would have allocated half of the household surplus to Reynolds' husband as not available to repay Reynolds' student loan debt.[76]

This analysis is at direct odds with the well-established principle that household income is the proper starting point when considering a debtor's ability to repay student loan debt.[77] Judge Bright, however, relied on *Innes v. State (In re Innes)* to support the conclusion that Reynolds's husband is entitled to half of the monthly surplus. Like *Reynolds*, the husband-debtor in *Innes* contributed about 52% of the household income.[78] The bankruptcy court considered all of the non-debtor wife's income, applied her income to one-half of the family's basic expenses, and allowed the non-debtor wife to use the remaining income to meet reasonable and appropriate non-luxury expenditures.[79] Although the bankruptcy court acknowledged that a non-

73. The majority decision purposely did not address this issue. Educ. Credit Mgmt. Corp. v. Reynolds (*In re* Reynolds), 425 F.3d 526, 534 (8th Cir. 2005) (Bright, J., concurring specially).

74. *Id.* at 535–36.

75. *Id.* at 535.

76. *Id.* at 535–36.

77. White v. U.S. Dep't of Educ. (*In re* White), 243 B.R. 498, 509 n.9 (Bankr. N.D. Ala. 1999) (citing forty-nine cases that consider the income of the non-debtor spouse when determining whether the debtor can maintain a minimal standard of living while repaying student loan debt). The *White* court concluded that because § 523(a)(8) considers the impact of a finding of non-dischargeability on the debtor and the debtor's dependents, the income of the debtor's entire household must be considered. *Id.* at 510. Judge Bright mentions *White* but factually distinguishes it from *Reynolds*. *Reynolds*, 425 F.3d at 535.

78. Innes v. State (*In re* Innes), 284 B.R. 496, 500 (Bankr. D. Kan. 2002). The debtor-husband contributed $30,690.32 (or approximately 52%) of the $58,839.32 annual household income. *Id.* Similarly, Reynolds contributed $1700 (or 51.5%) of the household monthly income of $3300. Reynolds v. Pa. Higher Educ. Assistance Agency (*In re* Reynolds), 303 B.R. 823, 828–29 (Bankr. D. Minn. 2004).

79. *Innes*, 284 B.R. at 507. The one-half multiplier used by the bankruptcy court

debtor's income should be applied to that spouse's fair share of the family expenses, the general rule was inapplicable here because of the nearly equal income contribution of the spouses and the non-luxurious lifestyle enjoyed by the debtor and his dependents.[80]

The Minnesota bankruptcy court also gained some *Reynolds* traction by steadfastly refusing to consider the income of the non-debtor spouse in the *Halverson* case.[81] Halverson and his spouse married when both were in their early sixties.[82] Before they married, they entered into an antenuptial agreement to memorialize their intent to keep their finances separate.[83] The court noted that a spouse's income may be considered in the undue hardship analysis but only to the extent that it decreases the debtor's expenses.[84] Ultimately, the court concluded that the non-debtor spouse was free to spend her income as she saw fit, a conclusion at odds with the majority view.[85]

Outside the Eighth Circuit, courts generally continue to use household income as the starting point.[86] In *Davis v. Educational Credit Management Corp. (In re Davis)*, the Bankruptcy Court for the Western District of New York was faced with a situation where the majority of the household income was earned by the non-debtor spouse.[87] While acknowledging that Davis met the undue hardship standard if the

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was affirmed, although the non-debtor wife's income contribution was approximately 48%. The court also suggested that paying for the college education of her children was a permissible use of the non-debtor wife's income. *Id.* at 506.

80. *Id.* at 507–08. The non-debtor spouse in *White* earned three times the income of the debtor, and the household enjoyed more than a minimal standard of living. *White*, 243 B.R. at 512 n.15; *See also* Halverson v. U.S. Dep't of Educ. (*In re* Halverson), 401 B.R. 378, 386 (Bankr. D. Minn. 2009); *Innes*, 284 B.R. at 508.

81. Halverson, 401 B.R. 378.

82. *Id.* at 386.

83. *Id.* The antenuptial agreement memorialized their understanding that their premarital property would not become marital property and that neither party would be responsible for or obligated to pay any liability incurred by the other. *Id.*

84. *Id.*

85. *Id.* ("It would be unfair to expect [the non-debtor spouse] to either pay all of Halverson's personal expenses just so he can make payments on a loan he incurred years before the marriage, or to pay those loans for him."); *see also supra* note 77 (discussing *White*, 243 B.R. 498.

86. *See, e.g.*, Lorenz v. Am. Educ. Servs. (*In re* Lorenz), 337 B.R. 423 (B.A.P. 1st Cir. 2006) (taking finances of partner into account, debtor failed to prove undue hardship); Heinrich v. Nelnet (*In re* Heinrich), No. 08-02029, 2009 WL 613574 (Bankr. W.D. Mo. Mar. 5, 2009) (including income of minor child's paper delivery route in household income); Archibald v. United Student Aid Funds, Inc. (*In re* Archibald), 280 B.R. 222 (Bankr. S.D. Ind. 2002) (taking household income into account).

87. Davis v. Educ. Credit Mgmt. Corp. (*In re* Davis), 336 B.R. 604 (Bankr. W.D.N.Y. 2006), *rev'd*, 373 B.R. 241 (W.D.N.Y. 2007).

court only considered her income, the court posed a number of hypothetical situations regarding the relevance of marital considerations in the undue hardship analysis:

> [I]n a different case, a minimally employed debtor might reside with parents, siblings, or friends. Should discharge depend upon total household income, when a discharge of educational loans is allowed to a similarly employed and employable debtor who lives alone? Alternatively, should the court deny a discharge because a debtor could have chosen to return to the parental abode? To what extent should the court ever consider the prospects for a marriage that might place the debtor into a household where repayment of the student loan would impose a more manageable financial burden?[88]

Ultimately, the bankruptcy court determined that Davis satisfied the test for undue hardship and discharged all but the principal sum of $8150.[89] On appeal, the district court reversed, holding it was legal error not to consider the income of the non-debtor spouse.[90] Considering the total household income, the district court concluded that Davis did not satisfy the minimal-standard-of-living prong.[91]

The Eighth Circuit's *Reynolds* decision blew the household income analysis door open to interpretation, and it remains to be seen how courts will handle the issue, especially in light of other concerns embedded within the household income inquiry.[92] Post-*Reynolds*, the Eighth Circuit's endorsement of non-pecuniary factors continued to muddy the undue hardship analysis.[93] Left unanswered by *Reynolds* was the proper interplay between disposable income, required monthly payment, and an undue hardship discharge. Because *Reynolds* took the seemingly unambiguous phrase from *Long* and subor-

88. *Davis*, 336 B.R. at 609.

89. *Id.* at 610.

90. *Davis*, 373 B.R. at 241. *See supra* note 79 (discussing Innes v. State (*In re* Innes), 284 B.R. 496 (Bankr. D. Kan. 2002)).

91. *Davis*, 373 B.R. at 241.

92. *See, e.g.*, Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961 (1998) (considering state laws regarding spousal assets and marital property generally, marriage as a contract, and marriage as a partnership). Dickerson concludes that "because Congress currently gives debtors certain benefits based simply on marital status, it must decide what marriage means and to what extent married couples must love, honor, and pay each other's debts." *Id.* at 1022.

93. The concurring opinion also opened the door to a wholesale disruption of the household income issue. Educ. Credit Mgmt. Corp. v. Reynolds (*In re* Reynolds), 425 F.3d 526, 534 (8th Cir. 2005) (Bright, J. concurring).

dinated it to a consideration of non-pecuniary factors, the question remained: *In the absence of non-pecuniary factors, is the existence of disposable income sufficient to satisfy the required monthly payment a proper basis for denying an undue hardship discharge?* In 2009, the Eighth Circuit gave us the answer.

C. Jesperson: *The Eighth Circuit Tightens Up the Test*

Debtor Mark Jesperson was a forty-three-year-old unmarried attorney with two children.[94] Although he was a recovering alcoholic, Jesperson had no mental or physical impairments or limitations.[95] Jesperson spent nearly eleven years obtaining his undergraduate degree, but graduated from law school in less than five years and passed the Minnesota bar exam on his first attempt.[96]

The bankruptcy court aptly characterized Jesperson's sporadic employment history as a "history of employment retention difficulty" and observed that "his record of work experience is besmirched by a patent lack of ambition, cooperation and commitment."[97] At the time of trial, however, Jesperson was working through a temporary legal placement service and earning approximately $48,000 per year, with net monthly income of $2680.[98] The bankruptcy court determined that Jesperson's monthly expenses were $2625 and found that Jesperson was eligible for an income contingent repayment plan (ICRP) that would make his estimated payments between $514 and $629 per month.[99] Despite having an income surplus, the bankruptcy court fo-

94. Jesperson v. U.S. Dep't of Educ. (*In re* Jesperson), 366 B.R. 908, 910 (Bankr. D. Minn. 2007). Jesperson had two children from two prior relationships. *Id.* He was under a court order to pay $500 monthly for his oldest child. *Id.* There was no court order in place for the youngest child. *Id.*

95. Jesperson had been sober for nearly eleven years at the time of trial. *Id.*

96. Jesperson attended school irregularly for only five of eleven consecutive years between 1983 and 1994, finally obtaining a Bachelor of Arts degree in English literature. *Id.* Jesperson started law school in 1995 and earned his Juris Doctorate from Lewis and Clark Law School in 2000. *Id.* at 911.

97. *Id.* at 911.

98. *Id.* at 910, 916. There is nothing in the opinion to indicate how the court arrived at this net income calculation. However, the district court's opinion clarified that this calculation was based on a presumed 33% tax bracket. Educ. Credit Mgmt. Corp. v. Jesperson, No. 06-2130, 2007 WL 4105221, at *6 n.3 (D. Minn. Nov. 14, 2007).

99. *Jesperson*, 366 B.R. at 916. The ICRP is a repayment option available to student loan borrowers in the William D. Ford Direct Loan Program. *See generally* 34 C.F.R. § 685, et seq. (2008). Effective July 1, 2009, another income based repayment option became available to all federal student loan borrowers. Similar to the ICRP, the Income Based Repayment (IBR) option is a payment option that determines the

cused on Jesperson's historical earning capacity, noting that "[t]he present time, since January of [2007], is an unprecedented period of pecuniary abundance for Jesperson."[100] The court concluded that "[r]ealistically, based on the concrete past, the expectation that Jesperson [would] maintain or increase his current rate of pay is one part rational to two parts imagination," and, therefore, the court discharged Jesperson's student loan debt, which totaled over $364,000.[101]

To support the discharge, the bankruptcy court focused primarily on the interplay between the ICRP and a § 523(a)(8) undue hardship discharge.[102] The court ultimately concluded that, although the ICRP is a proper consideration in the undue hardship analysis, many factors contribute to the appropriate *weight* to give a debtor's ability to pay under the ICRP.[103] The court pointed to an amortization table noting that, even with the lowest possible monthly ICRP payment of $514, none of Jesperson's payments would reduce the outstanding principal, nor would they be sufficient to cover the monthly accruing interest.[104] After concluding the ICRP was not a viable option for Jesperson, the bankruptcy court discharged the student loan debt, holding:

> Jesperson has only to look forward to a quarter century of negative amortization, the burden of poor credit and a cash-only lifestyle due to a heavy debt to income ratio, until finally at the age of 68 he would be released . . . , and then have a

required payment by considering the borrower's income, family size, and 150% of the applicable poverty guidelines. 34 C.F.R. §§ 682.215, 685.221 (Effective July 1, 2009). The annual repayment amount under the IBR is capped at 15% (instead of 20% under the ICRP) of the borrower's disposable income. *Id.*

In *Jesperson*, the difference in the estimated monthly payment amounts are based on the applicable family size used in the calculation. *Jesperson*, 366 B.R. at 913. The $629 payment assumes a family size of one; the $514 payment assumes a family size of three. *Id.* An annual income of $48,000 was used in the calculation. *Id.*

100. Jesperson, 366 B.R. at 913.

101. *Id.* at 913, 918.

102. *Id.* at 914–16. The bankruptcy court said, "[I]f the ICRP is intended to supplant the judicial process under § 523(a)(8), serve as the sole and final resort for financially distressed federal student loan borrowers, and entirely eliminate possible dischargeability of student loan debt, then Congress may so remake the law and repeal § 523(a)(8)." *Id.* at 915.

103. Examples include the debtor's age, the potential for a poor credit burden, and potential forgiveness with possible derivative income tax liability. *Id.* at 916.

104. *Id.* at 917. "[O]ver the course of 25 years the debtor will never be able to make a single payment actually against the ECMC debt." *Id.* The court seemed to make a distinction between *payment* and *actual payment*, a distinction not relevant in the § 523(a)(8) analysis: "Importantly, the lengthy and burdensome participation of the debtor in the ICRP, in this particular case under the totality of these unique circumstances, would result in little or no *actual* repayment relief to the lenders and loan guarantors in any event." *Id.* at 918 (emphasis added).

> real opportunity for a fresh start. In short, without the relief of discharge now, the debtor would, in effect, be sentenced to 25 years in a debtors' prison without walls.[105]

The district court affirmed, and ECMC appealed to the Eighth Circuit.[106]

In its decision, the Eighth Circuit rightly noted the rigorous burden a debtor faces when seeking a § 523(a)(8) discharge and reiterated the passage from *Long* setting forth the appropriate discharge standard.[107] The court also took a markedly different view of the facts presented, specifically regarding Jesperson's employment history and prior payment history, noting that Jesperson had quit each of his jobs for a variety of personal reasons and that the future outlook of his current temporary position was better than suggested by the lower court.[108] Significantly, the Eighth Circuit pointed out that Jesperson had never made any payments on any of his loans and quoted Jesperson's admission at trial that, *even if he had extra money*, he did not think he should have to pay his loans.[109] After correcting several bankruptcy court errors regarding Jesperson's income and expenses, the court found Jesperson had a monthly surplus of about $900.[110]

The court also disagreed with the lower court's conclusion regarding Jesperson's earning potential. Given Jesperson's "young age, good health, number of degrees, marketable skills, and lack of substantial obligations to dependents or mental or physical impairments," the court concluded that the only possible basis for granting Jesperson an undue hardship discharge was the

> sheer magnitude of his student loan debts. . . . When the size of the debts is the principal basis for a claim of undue hardship, the generous repayment plans Congress authorized the Secretary of Education to design and offer under the [Ford Program] become more relevant to a totality-of-

105. *Id.*

106. Educ. Credit Mgmt. Corp. v. Jesperson, No. 06-2130, 2007 WL 4105221, at *2–3 (D. Minn. Nov. 14, 2007). ECMC was the only creditor to appeal the bankruptcy court's ruling. *Id.* at *1 n.1.

107. Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009). *See also supra* notes 35–38.

108. *Jesperson*, 571 F.3d at 779.

109. *Id.*

110. For example, the court held it was clear error to use the inflated tax rate of 33 1/3% and to estimate housing expenses at $1000. "On this record, it is apparent that the court underestimated Jesperson's monthly net income and overestimated his reasonable and necessary living expenses in concluding he has no current surplus from which student loans could be repaid." The court relied on an after-tax net income of $3300 applying a 17.5% tax rate. *Id.* at 780.

the-circumstances undue hardship analysis.[111]

The court specifically noted too the incongruous results that would be reached if a debtor were granted an undue hardship discharge because his prior inaction and failure to pay allowed the debt to grow substantially.[112] Lastly, the Eighth Circuit emphasized the importance of alternative repayment options in situations where the size of the debt was the only colorable basis for a claim of undue hardship.[113] Because Jesperson had an income surplus sufficient to satisfy the required ICRP payment, the Eighth Circuit reversed the discharge in another 2–1 decision.[114]

Judge Smith, specially concurring, agreed that the discharge should be reversed, but wrote separately to emphasize that ICRP was merely one factor in the totality-of-the-circumstances test analysis.[115] Judge Smith highlighted the fact that Jesperson's situation was self-imposed and a direct consequence of his voluntary choices:

> Jesperson's current situation seems to be the result of his own self-imposed limitations, evidenced by his routinely quitting jobs after a short period of time. Such a "patent lack of ambition, cooperation and commitment," . . . does not support a finding of dischargeability under § 523(a)(8).[116]

The dissent strongly disagreed that Jesperson's discharge should be reversed, primarily rejecting the majority's overemphasis of the ICRP in the undue hardship:

> Therefore, I emphasize that placing undue weight on a debtor's ability to qualify for the ICRP improperly limits the inherent discretion afforded to bankruptcy judges when evaluating requests for § 523(a)(8) relief, and reduces the totality-of-the-circumstances test to a simple arithmetical calculation.
>
> . . .
>
> Further, overemphasizing the impact of the ICRP would be

111. *Id.* at 780–81.
112. *Id.* at 780.
113. *Id.* at 781.
114. *Id.* at 783. Interestingly, the last two student loan hardship matters from the Eighth Circuit have generated six different opinions. Both *Reynolds* and *Jesperson* had a majority, specially concurring, and dissent opinions.
115. *Id.* at 783 (Smith, J., concurring). "I write separately to emphasize that whether the debtor enrolled in the [ICRP] remains merely 'a factor' to consider when applying the totality-of-the-circumstances test." *Id.* The dissenting judge concurred with this statement. *Id.* at 787 (Bye, J., joining, in part, Judge Smith's concurring opinion, and dissenting).
116. *Id.* at 784–85 (Smith, J., concurring).

> antithetical to the exercise of judicial discretion mandated by § 523(a)(8) and reflected in our totality-of-the-circumstances analysis.[117]

The bankruptcy court's disregard of the ICRP in *Jesperson* is not surprising considering that the intermediate appellate courts in the Eighth Circuit have been very critical of the ICRP and how, if at all, it should alter the § 523(a)(8) analysis.[118] Nationally, there is no real judicial consensus regarding the ICRP as an alternative to a § 523(a)(8) discharge.[119] This makes the Eighth Circuit's decision especially remarkable, because it represents not only a significant departure from the usual ICRP analysis in the Eighth Circuit, but it also contravenes the approach taken by some recent decisions addressing the issue.[120]

Further, the Eighth Circuit rebutted many of the common arguments advanced by ICRP detractors. First, the court rejected the argument that forcing a debtor into the ICRP contravenes the "fresh start" principle of the Bankruptcy Code and clarified that the absence

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117. *Id.* at 786–89 (Bye, J., joining, in part, Judge Smith's concurring opinion, and dissenting).

118. *See, e.g.*, Lee v. Regions Bank Student Loans (*In re* Lee), 352 B.R. 91 (B.A.P. 8th Cir. 2006) (suggesting that ICRP serves a fundamentally different purpose than the discharge provisions of the Bankruptcy Code, and thus should not be given undue weight under the totality-of-the-circumstances analysis); Cumberworth v. U.S. Dep't of Educ. (*In re* Cumberworth), 347 B.R. 652 (B.A.P. 8th Cir. 2006) (stating that a debtor's ability or inability to participate in an ICRP plan is merely one of many factors to be considered by bankruptcy courts).

119. *Compare* Fahrenz v. Educ. Credit Mgmt. Corp. (*In re* Fahrenz), No. 05-1657, 2008 WL 4330312, at *10 (Bankr. D. Mass. Sept. 17, 2008) ("I also agree that the existence of a zero payment under the ICRP does not generally obviate the need for undue hardship discharges in bankruptcy."); DeNittis v. Educ. Credit Mgmt. Corp. (*In re* DeNittis), 362 B.R. 57, 64 (Bankr. D. Mass. 2007) ("To hold that debtors must participate in the Ford Program, if eligible, would be no more than the Court abdicating its responsibility to determine the discahrgeability of a student loan."), *with* Mosko v. Educ. Credit Mgmt. Corp., 515 F.3d 319, 326 (4th Cir. 2008) (seeking out loan consolidation options is "an important component of the good-faith inquiry"); Tirch v. Pa. Higher Educ. Assistance Agency (*In re* Tirch), 409 F.3d 677 (6th Cir. 2005) (debtor unable to prove good faith for failure to take advantage of the ICRP); Pa. Higher Educ. Assistance Agency v. Birrane (*In re* Birrane), 287 B.R. 490 (B.A.P. 9th Cir. 2002) (good-faith measured by a debtor's effort to participate in the ICRP); *see also* Terrence L. Michael & Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73 (2005).

120. *See, e.g.*, Booth v. U.S. Dep't of Educ. (*In re* Booth), 410 B.R. 672 (Bankr. E.D. Wash. 2009) (debtor not precluded from establishing an inability to maintain a minimal standard of living by virtue of having a $0 monthly payment obligation under the ICRP); Zook v. Edfinancial Corp., No. 05-10019, 2009 WL 512436 (Bankr. D.D.C. Feb. 27, 2009) (failure to pursue the ICRP not bad faith because the ICRP is not always a viable option for debtors).

of a fresh start for a debtor able to make the required monthly ICRP payment is not an undue hardship.[121] The majority also brushed off speculation that the ICRP forgiveness would create a taxable event: "Likewise, the court's reference to 'a potentially significant tax bill' when any unpaid balance is cancelled after twenty-five years ignored the fact that cancellation results in taxable income only if the borrower has assets exceeding the amount of debt being cancelled."[122] Third, and perhaps most important, the Eighth Circuit emphasized that a debtor's future income possibilities are not relevant when a debtor is eligible for the ICRP, likely because the ICRP calculation accounts for potential income fluctuations and adjusts the required monthly payment accordingly.[123]

It is important to clarify that the majority opinion in *Jesperson* does not stand for the proposition that eligibility in the ICRP automatically precludes a § 523(a)(8) discharge.[124] In fact, no circuit court has mandated such a result.[125] Rather, *Jesperson* reinforces that a debtor with surplus income sufficient to satisfy the monthly payment required by an available repayment option is not entitled to an undue hardship discharge under § 523(a)(8).[126]

121. Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009).

122. *Id.* (citing 26 U.S.C. § 108(a)(1)(B) (2006)).

123. *Id.* at 783. "When a debtor is eligible for the ICRP, the court in determining undue hardship should be less concerned that future income may decline." *Id. See also* 34 C.F.R. § 685.209 (2009).

124. The dissent infers that the majority opinion requires denial of discharge to anyone who is eligible for the ICRP. *Jesperson*, 571 F.3d at 786–90 (Bye, J., joining, in part, Judge Smith's concurring opinion, and dissenting).

125. *See, e.g.*, Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007) (debtor's failure to enroll in the ICRP did not detract from other good faith efforts at repayment); Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 364 (6th Cir. 2007) (affirming prior rejection of *per se* rule that failure to enroll in the ICRP precludes a finding of good faith); Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (noting that a debtor's consideration of consolidation options is an important consideration, but quoting *Alderete, infra,* that participation is not required); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 402 (4th Cir. 2005) (noting that a debtor's effort to seek out loan consolidation options that make the debt less onerous is an important consideration, but not dispositive); Alderete v. Educ. Credit Mgmt. Corp. (*In re* Alderete), 412 F.3d 1200, 1206 (10th Cir. 2005) (agreeing with the bankruptcy court that participation in an alternative repayment program is not required to satisfy the good-faith prong of the *Brunner* test).

126. Although the opinion focuses on the ICRP, it is likely that the reasoning would be analogous to any alternative repayment plan available to a student loan borrower.

III. CONCLUSION

Our legal system rests on the principle of precedent—that like cases will be decided in a like manner.[127] Moreover, the U.S. Constitution requires uniformity in bankruptcy law.[128] In this light, Congress enacted and subsequently expanded the undue hardship statute to make it clear that student loan debt is not dischargeable except in the most extreme circumstances and not at all if the debtor has the financial ability to repay the debt. Of the examples at the beginning of this article, the third example—Laura Reynolds—is the only debtor who received a discharge despite a demonstrated ability to pay the debt. The Eighth Circuit's *Reynolds* decision deviated not only from every other circuit's precedent but also from the congressional mandate in § 523(a)(8).

To a large degree, the Eighth Circuit seems to have righted the *Reynolds* anomaly in its *Jesperson* decision. By tightening up the totality-of-the-circumstances test and refocusing the analysis on the debtor's ability to pay, the Eighth Circuit reminds bankruptcy courts that a large student loan debt, by itself, cannot justify a discharge under the bankruptcy code. *Jesperson* also underscores the importance of alternative income-based repayment programs in the undue hardship analysis. Under *Jesperson*, income-based repayment plans are neither dispositive nor an infringement of judicial discretion. Rather, *Jesperson* recognizes that repayment of student loans, even if under an income-based payment scheme that doesn't fully repay the debt, is critical to maintain the federal student loan program.

127. As the Seventh Circuit held: "Legal rules have value only to the extent they guide primary conduct or the exercise of judicial discretion. Laundry lists, which may show ingenuity in imagining what *could* be relevant but do not assign weights or consequences to the factors, flunk the test of utility." *In re* Plunkett, 82 F.3d 738, 741 (7th Cir. 1996).

128. U.S. CONST. art. I, § 8, cl. 4.