

IT IS SO ORDERED.

Dated: 10:44 AM August 28 2006


MARILYN SHEA-STONUM *JS*
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:)	CASE NO. 05-56282
)	
JOHN KENNETH WAGNER AND)	CHAPTER 7
DIANE C. WAGNER,)	
)	
DEBTORS.)	
)	ADVERSARY NO. 05-5133
JOHN KENNETH WAGNER,)	
)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),)	
)	
vs.)	MEMORANDUM OPINION RE:
)	DISCHARGEABILITY OF
E D U C A T I O N A L C R E D I T)	E D U C A T I O N A L L O A N S
MANAGEMENT CORPORATION, <i>et al.</i> ,)	PURSUANT TO 11 U.S.C. §523(a)(8)
)	
DEFENDANT(S).)	

This matter comes before the Court on John Kenneth Wagner's complaint to determine the dischargeability of student loan debt pursuant to 11 U.S.C. §523(a)(8). A trial in this matter was held on July 7, 2006. Appearing at the trial were William Howard, counsel

for John Kenneth Wagner (“Mr. Wagner”) and Frederick Coombs, counsel for defendant, Educational Credit Management Corporation (“ECMC”). During the trial, the Court received evidence in the form of exhibits and in the form of testimony from Mr. Wagner and his spouse, Diane C. Wagner (“Mrs. Wagner”). At the conclusion of the trial, the Court took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). In reaching its determinations and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the testifying witness. Based upon such testimony, the evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding, the main chapter 7 case of Mr. and Mrs. Wagner (the “Debtors”) and Mr. Wagner’s prior chapter 13 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not disputed by Mr. Wagner and ECMC and are the subject of stipulations [docket #20].

1. Mr. Wagner is a joint debtor before this Court, having filed his Petition under Chapter 7 of Title 11 of The United States Code on September 21, 2005.
2. On or about March 25, 1988, Mr. Wagner borrowed Two Thousand Six Hundred Twenty-Five Dollars (\$2,625.00) under a student loan under the

GSLP Program.¹

3. On or about March 12, 1988, Mr. Wagner borrowed Two Thousand Nine Hundred Ninety-Three Dollars (\$2,993.00) under a student loan in the SLS Program.
4. ECMC is a student loan guarantee agency that is attempting to collect this student loan debt from Mr. Wagner.
5. Defendant ECMC is the holder by assignment and transfer of the Promissory Notes evidencing such student loans.
6. Mr. Wagner has previously filed for relief under Title 11, Chapter 13 in 1994 and proposed, had confirmed and completed a five (5) year Chapter 13 Plan.
7. ECMC had filed a Proof of Claim in the Chapter 13 case filed by Mr. Wagner in the principal amount of Eight Thousand Two Hundred Forty Dollars Sixty-two cents (\$8,240.62) in 1995, on which it received payments through the Chapter 13 Plan totaling Four Thousand One Hundred Twenty Dollars Thirty-one Cents (\$4,120.31).
8. Mr. Wagner's birth date is December 5, 1942 and Mrs. Wagner's birth date is February 20, 1948.
9. Mr. Wagner has received a letter of determination of disability sent by the Social Security Administration.
10. Mrs. Wagner, has received a determination of disability letter from the Ohio Public Employees Retirement System (hereinafter "OPERS").
11. Although the Debtors own a home located at 955 Chalker Street, Akron, Ohio, no payments have been made thereon since December 2005, and the mortgage holder has received a Relief from Stay to commence foreclosure. The Debtors have abandoned their home.²

¹ Mr. Wagner testified that he incurred this student loan and the loan referenced in paragraph 3 (collectively, the "Student Loan Obligation") for the purpose of obtaining his commercial drivers license ("CDL") for long distance truck driving.

² The written Stipulations filed with the Court indicate that the Debtors expected to abandon their home. At trial, counsel agreed to amend this Stipulation to reflect that since the date the Stipulations were submitted to the Court, Debtors had

12. Mr. Wagner has surrendered his 2004 Dodge Dakota Truck in January 2006 and no longer owns that vehicle nor is he making payments on same.
13. Mr. Wagner has been made aware of the graduated and Income Contingent Repayment Programs available under the William D. Ford Program of the Department of Education.

In addition to the foregoing stipulations, the Court makes the following findings of fact.

1. Debtors received a discharge in their main chapter 7 case on January 13, 2006.
2. The Debtors have each previously filed for protection under the Bankruptcy Code.
3. Mrs. Wagner first filed a petition for relief in 1971, when she was eight months pregnant, following a fire that destroyed everything she owned.
4. Mrs. Wagner testified that she filed another petition for relief in 1995 under Chapter 13 of the Bankruptcy Code and received a hardship discharge in 1999.³

Debtors' health

5. In 1999, just prior to scheduled back surgery, Mrs. Wagner suffered a mini stroke. Following the mini stroke, she was cleared for back surgery, which she underwent. After the back surgery, Mrs. Wagner suffered a major stroke that affected her speech and use of her right arm. Though she has received

abandoned their home at 955 Chalker. Debtors now reside on the first floor of a rented house.

³ The Court believes that Mrs. Wagner was confused about the dates of her prior cases. Based on a review of the Court's electronic case filing / case management system, it appears that Mrs. Wagner had filed three chapter 13 petitions during the 1990s. In 1991, Mrs. Wagner filed a chapter 13 which was discharged on June 20, 1996. On July 12, 1996, Mrs. Wagner filed another chapter 13. On her own motion, the 1996 chapter 13 case was dismissed on February 10, 1998. On March 16, 1998, Mrs. Wagner filed another chapter 13. This case was converted to one under chapter 7 in August 1999 and reconverted to a chapter 13 case in October 1999. Mrs. Wagner received a hardship discharge in this chapter 13 case on January 27, 2000.

months of therapy in an attempt to overcome the effects of the stroke, and has apparently made significant progress, Mrs. Wagner still suffers from impaired speech and limited use of her right arm. Mrs. Wagner has suffered several additional strokes since 1999, the last one in December 2004. In an attempt to control her stroke risk, Mrs. Wagner takes prescription medicine.

6. In addition to the stroke prevention medicine, Mrs. Wagner takes medication to control cholesterol, acid reflux, thyroid function and she takes hormone replacement medicine, allergy medicine, pain medicine and medication for stress management. In total, Mrs. Wagner takes approximately 14 different medications daily. Her monthly out-of-pocket cost for those prescriptions totals from \$75 to \$100 per month.
7. Mrs. Wagner also suffers from hypoglycemia and must follow a restricted diet to control this condition.
8. Mrs. Wagner has five teeth that are abscessed and will require medical treatment in the near future.
9. Mr. Wagner suffers from torn rotator cuffs and bone spurs. He had shoulder surgery in 2001 in an attempt to correct the problem. However, even after the surgery, Mr. Wagner has not been able to return to his job in shipping and receiving. Mr. Wagner is not able to do heavy lifting. Mr. Wagner testified that he relies on Mrs. Wagner to carry their groceries from the car into their house. In addition, Mr. Wagner has knee problems which prevent him from doing long distance trucking.
10. Overall, the Debtors do not appear to be in good health and it is likely that their health will continue to deteriorate.

Debtors' household income

11. At the time of trial, the Debtors' monthly household income totaled \$2,416.09 and consisted of three monthly payments.
12. First, Mr. Wagner's social security disability payment in the amount of \$1,147 which is deposited directly into his checking account.
13. Second, Mr. Wagner's Unum Long-Term Disability Insurance Payment in the amount of \$280.33 which is deposited directly into his checking account.
14. Third, the Mrs. Wagner's OPERS disability payment in the amount of \$988.76 which is deposited directly into her checking account.

15. In 2005, Mrs. Wagner earned \$5,400 from seasonal employment at a hotel in Nags Head, North Carolina. The hotel is owned by friends of Mrs. Wagner who offered employment to her in an attempt to help her financially. Mrs. Wagner testified that the hotel was for sale and that she did not believe she could work at the hotel in North Carolina this summer. In addition, the Debtors' health conditions makes them dependent upon each other, which makes Mrs. Wagner's traveling to and living in North Carolina without Mr. Wagner unfeasible.
16. The Debtors' household income is expected to decrease in December 2007 when the Unum Provident Long Term Disability Payment to Mr. Wagner ceases. *See* Exhibit N.
17. The Debtors' do not own any assets of significant value and do not have any savings.
18. Mr. Wagner worked in shipping and receiving from 1966 until 1988 when he decided to go to school to obtain his CDL. After attending school to obtain his CDL he worked long distance trucking for CRST. While working for CRST, CRST paid \$50 per month towards Mr. Wagner's Student Loan Obligation. Due to personal reasons, Mr. Wagner left CRST and began working for OTC doing local trucking. In 1990, he began working for Hornell in Shipping and Receiving again. He worked there until he could no longer physically do the job. His physical condition also prevents him from being able to work in trucking.
19. Mr. Wagner testified that he believed that through his Chapter 13 plan, which he filed with the assistance of counsel, he would pay 50% of his Student Loan Obligation and then he would pay the remaining 50% in the 42 months following completion of his Chapter 13 plan. After completing his Chapter 13 plan in April 1999, Mr. Wagner learned that, despite language in the Order confirming his Chapter 13 plan that might have suggested otherwise, his Student Loan Obligation had continued to accrue interest during the pendency of his Chapter 13 plan. Therefore, the remaining balance on his Student Loan Obligation was larger than Mr. Wagner had believed it would be at the end of his Chapter 13 case.
20. Mr. Wagner sought the assistance of counsel to help him determine precisely the amount of the student loan debt still owing to ECMC. In April 2000, a motion was filed on his behalf seeking to reopen his Chapter 13 case and determine the amount due to ECMC. By agreement between counsel for Mr. Wagner and ECMC's counsel, the Chapter 13 case was reopened. Nothing of record transpired from the time the case was reopened until the Court closed

the Chapter 13 case in June 2004. In November, 2004, new counsel for Mr. Wagner filed a motion to reopen. The case was reopened and Mr. Wagner's counsel filed a motion for hearing to determine the amount owed to ECMC. In response, ECMC requested the Court vacate the order confirming Mr. Wagner's chapter 13 plan to the extent it purported to effect a discharge of Student Loan Obligation. By agreed order in November, 2005, the order confirming Mr. Wagner's chapter 13 plan was partially vacated. The Chapter 13 case was dismissed and the Debtor filed for relief under Chapter 7 of the Bankruptcy Code and filed this adversary proceeding seeking to have his Student Loan Obligation declared dischargeable.

21. In the period between the pendency of his Chapter 13 case and the filing of his Chapter 7 case, ECMC was withholding 15% of Mr. Wagner's social security income each month. It was not disputed that Mr. Wagner has repaid more than the principal amount of his Student Loan Obligation.

Debtors' household expenses

22. At the time of trial, the Debtors had monthly expenses of \$2859.00. *See* Exhibit Q. The monthly expenses include Medicare Insurance Premiums of \$88.50 per month; medication costs for the Mr. Wagner of \$45; medication costs for Mrs. Wagner of \$75 - \$100 per month; rent payment of \$675; car payment of \$212 . Although the Debtors' expenditures in certain categories are higher than the IRS living expense figures, the Debtors' budget is sparse.
23. The Debtors' budget includes \$150.00 per month for donations to The Chapel. Mr. Wagner testified that although he would like to make this donation each month, he is not able to do so as other unexpected expenses that are not included in the budget, such as additional medical care or automobile expenses, often arise.
24. Based on a combined household income of \$18,465,⁴ the Debtor's payment

⁴ This is the Adjusted Gross Income shown on the Debtors' 2005 Tax Return. *See* Exhibit J. This amount excludes the majority of the income received by Mr. Wagner - his Social Security Disability. Thus, the calculation of the amount of payment under ICRP is based primarily on Mrs. Wagner's income. In addition, the amount includes the income Mrs. Wagner earned from seasonal employment in Nags Head, N.C. Based on the health condition of Mrs. Wagner, it is unlikely that she will be able to earn this income in any subsequent years. Defendant, ECMC, provides no authority which requires this Court to impute this speculative and unearned income to Mr. Wagner for the purposes of this determination.

under the Income Contingent Repayment Plan (“ICRP”) would be approximately \$60 per month for 300 months. *See* Exhibit E.

DISCUSSION

Pursuant to § 523(a)(8) of the Bankruptcy Code, educational loans are not dischargeable in bankruptcy “unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor’s dependents.” Congress did not define what constitutes an “undue hardship” but courts, including the Sixth Circuit Court of Appeals, have adopted what has come to be known as the *Brunner* test. *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677 (6th Cir. 2005); *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 623 (6th Cir. 2004); *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994).

Under the *Brunner* test a debtor must prove the following three factors by a preponderance of the evidence in order to be entitled to an “undue hardship” discharge of educational loans:

- [1] that 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 to indicate that this state of affairs is likely to persist for a significant portion of the loan repayment period; and
- [3] that debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987).

Brunner Factor One: Minimal Standard of Living

The Debtors' expenses exceed their income. ECMC argues that by reducing the figures for housing and utilities, cell phone expenses, cable expenses, clothing expenses and entertainment/enrichment expenses, the Debtors have a "surplus" of approximately \$200 from which they could make payments under the ICRP. However, this "surplus" disappears in December 2007 when Mr. Wagner's monthly payments of \$280 from Unum cease. The Debtors do not lead an extravagant lifestyle. A review of their budget shows that they have already minimized their expenditures where possible and still have not reached a sustainable surplus.

Accordingly, based upon the current income and expenses of the Debtors, the Court finds that Mr. Wagner cannot maintain a minimal standard of living if he were required to repay the Student Loan Obligation. The first factor of the *Brunner* test has, therefore, been met.

Brunner Factor Two: Additional Circumstances

To satisfy the second factor of the *Brunner* test Mr. Wagner must show that his current financial adversity is more than a temporary state of affairs. Such a showing requires evidence of "additional, exceptional circumstances strongly suggestive of continuing inability to repay over an extended period of time" *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2nd Cir. 1987). Such circumstances must be indicative of a "certainty of hopelessness, not merely a present inability to fulfill financial commitment." *In re Roberson*, 999 F.2d 1132, 1136 (7th Cir. 1993). They may include illness, disability, a lack of useable job skills, or the existence of a large number of dependents. *See Kraft v. New*

York State Higher Educ. Serv. Corp. (In re Kraft), 161 B.R. 82, 84 (Bankr.W.D.N.Y.1993).

And, most importantly, they must be beyond the debtor's control, not borne of free choice.

See Fischer v. State Univ. of New York (In re Fischer), 23 B.R. 432, 434 (Bankr.W.D.Ky.1982).

There is a certainty of hopelessness that surrounds this case. The record evidence suggests that Mrs. Wagner's health will continue to deteriorate over time and that Mr. Wagner's physical abilities will continue to be limited. Their inability to work, age, lack of retirement savings, medication requirements, current state of health, and foreseeable reduction in income leads the Court to conclude that Mr. Wagner's current financial adversity is more than just a temporary state of affairs. The second factor of the *Brunner* test has, therefore, been met.

Brunner Factor Three: Good Faith

The "good faith" test encompasses the notion that a "debtor may not willfully or negligently cause his own default, but rather his condition must result from 'factors beyond his reasonable control.'" *In re Roberson*, 999 F.2d at 1136. "Factors to be considered include the number of payments [the d]ebtor made, attempt to negotiate with the lender, proportion of loans to total debt, and possible abuse of the bankruptcy process." *In re Windland*, 201 B.R. 178, 183-84 (Bankr. N.D. Ohio 1996). Mr. Wagner has repaid the principal amount of his Student Loan Obligation. Following the completion of his Chapter 13 plan, Mr. Wagner intended to make monthly payments of \$100 to ECMC. When Mr. Wagner learned that ECMC believed the balance remaining was larger than \$4,200, Mr. Wagner attempted

through counsel to discern precisely how much remained owing to ECMC.

ECMC argues that Mr. Wagner's decision not to participate in the ICRP or to seek a total and permanent disability administrative discharge shows Mr. Wagner lacked the requisite good faith to meet the third prong of the *Brunner* test. Lack of participation in the ICRP or other administrative alternatives is not *per se* evidence of lack of good faith. *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 682 (6th Cir. 2005). As noted by the Bankruptcy Court in *Balaski v. Educ. Credit Mgmt. Corp. (In re Balaski)*, 280 B.R. 395 (N.D. Ohio 2002)

Alternate payment plans are just one factor in a lengthy list of factors which can be considered. *See, e.g., Long v. Educ. Credit Mgmt. Corp. (In re Long)*, 271 B.R. 322, 332 (8th Cir. BAP 20[0]2); *Ford v. Student Loan Guarantee Found. of Ark. (In re Ford)*, 269 B.R. 673, 677 (8th Cir. BAP 2001). Looking at debtor's finances and prospects, the court does not see that debtor's financial situation is going to improve, in the next year or twenty-five years, to provide for any meaningful repayment of the debt. Debtor lives modestly and is unable to meet all expenses with his income, making participation in any repayment plan an undue hardship. While defendant may believe holding debtor hostage for twenty-five years to debt and compounding interest is not an undue hardship, the court does not accept this view.

In re Balaski, 280 B.R. at 400; *see also In re Barrett*, 339 B.R. 435,443 (Bankr. N.D. Ohio 2004) *aff'd In re Barrett*, 337 B.R. 896, (6th Cir. B.A.P. 2006).

These Debtors have no reasonable hope of ever paying the entire amount due on Mr. Wagner's Student Loan Obligation. That Mr. Wagner does not want to be "held hostage" for twenty five years does not show a lack of good faith. Mr. Wagner attempted to deal with his Student Loan Obligation through a prior chapter 13 case, which he completed. Payments made during his chapter 13 case and by other means total more than the original principal amount of his Student Loan Obligation. Mr. Wagner has made good faith efforts to repay his

Student Loan Obligation.

Accordingly, the Court finds that the third factor of the *Brunner* test has been met.

CONCLUSION

Based upon the foregoing the Court finds that Mr. Wagner is entitled to an “undue hardship” discharge of the Student Loan Obligation as he has satisfied his burden of proving all three factors of the *Brunner* test. An entry of judgment consistent with this Memorandum Opinion will be entered separately in this proceeding.

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cc: (via electronic mail) Frederick Coombs
William Howard