UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re: Donald A. Lowe Debtor. Donald A. Lowe Plaintiff, v. Educational Credit Management Corporation, Defendant.	))))))))))))))	Case No. 00-35120 Chapter 7 Adv. Pro. No. 01-3082 Hon. Mary Ann Whipple

MEMORANDUM OF DECISION

This adversary proceeding was before the court for trial upon Plaintiff Donald Lowe's ("Mr. Lowe") Complaint against substituted Defendant, Educational Credit Management Corporation ("ECMC"), seeking a discharge of student loan debt as an undue hardship.

This case arose in and is related to Mr. Lowe's chapter 7 bankruptcy case. The court has jurisdiction over Mr. Lowe's chapter 7 case and this adversary proceeding under 28 U.S.C. §§ 1334(b) and 157(a) and (b) and under General Order 84-1, the general order of reference in this district. Determinations of the dischargeability of particular debts are core proceedings which this court may hear and determine under 28 U.S.C. § 157(b)(2)(I). This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the sole witness, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that Mr. Lowe's student loan debt to ECMC shall be discharged, in part, as an undue hardship, with the balance nondischargeable pursuant to 11 U.S.C. § 523(a)(8).

Findings of Fact:

The parties stipulated that the Defendant, ECMC, is now the holder of eleven student loan notes executed by Mr. Lowe. [Doc. #28]. There is no dispute that these loan debts are of the kind excepted from an individual bankruptcy debtor's chapter 7 discharge by § 523(a)(8). Mr. Lowe obtained these student loans from 1991 through 1995. [*Id.*]. The total amount originally disbursed to Mr. Lowe was $35,375.00. [*Id.*]. The total amount due and owing as of May 15, 2001, was $67,649.67, comprised of a principal balance of $43,690.65 (due to recapitalization of principal and interest), accrued interest of $11,072.24 and collection costs of $12,886.78. The notes are not themselves in evidence, so the original repayment terms are not precisely known to the court. It does not appear that the parties agreed to consolidation of the loans, rather they have all been transferred to ECMC.

Mr. Lowe's repayment history on the loans is vague. His testimony indicates that he had at least two deferments and made a few payments, of unknown timing and wholly unquantified as to amount. He believes that he may have made a few payments for a short period in 1995, and might have made a few in 1998, but did not make any in 1999, 2000, or 2001. There is evidence that he had at least two other student loans, disbursed in 1994, that were paid off in 1998, in an amount estimated by Mr. Lowe to be approximately $4,000.00. [Lowe Trial Ex. #10]. He further testified that he had received another loan directly from Mercy Hospital School of Nursing that he repaid because they were willing to accept small payments.

As a benefit of some of the loans, Mr. Lowe obtained a nursing certificate, although he is still a few credits short of a bachelor's degree. The loans were used to finance his college education at Lourdes College in Sylvania, Ohio and the Mercy Hospital School of Nursing in Toledo, Ohio. Ultimately, Mr. Lowe became licensed as an RN in the State of Ohio in 1992, an occupation he pursued successfully until a workplace injury on August 17, 2000. Mr. Lowe also attended Macomb County Community College in Michigan and had extensive experience working in the financial services industry

before becoming a licensed RN. His highest income level in the financial services industry was estimated as somewhere in the $40,000s, somewhat more than he earned as an RN in the late 1990s. [Lowe Trial Ex. #9]. Mr. Lowe's income tax returns show his wages were $36,290.00 in 1997; $37,730.00 in 1998; and $34,081.00 in 1999. In 2000, the year of his accident, his wages dropped to $27, 711.00. [*Id.*].

Since his workplace accident, Mr. Lowe has depended on two sources of support for himself and his dependent, neither of which is taxable. He has been receiving workers compensation payments from the State of Ohio for temporary total disability. Although his bankruptcy Schedule I [Lowe Trial Ex. #11] shows monthly workers compensation receipts of $2, 216.00, Mr. Lowe testified on cross-examination that he receives a bi-weekly check of $1,083.00, which totals $2,353.00 per month. Mr. Lowe also receives $545.00 per month from the United States Social Security Administration as SSI for his ward, who is his sole dependent. All totaled, Mr. Lowe has nontaxable monthly revenue of approximately $2,900.00 at this time.

The prospects for continuation of this level of monthly revenue are unclear. Mr. Lowe will continue to receive workers compensation payments for temporary total disability until he either returns to work, is determined to have reached maximum medical improvement (about which there is now some dispute in the medical records), or his claim is certified for permanent total disability at which point he would anticipate receiving a lump sum settlement amount from the State of Ohio Bureau of Workers Compensation ("OBWC") and SSI. His condition has been certified by OBWC for both serious physical problems (cervical/thoracic strain and herniated disc) [Lowe Trial Ex. ##1, 4-6], and an associated mental disorder [Lowe Trial Ex. ## 2, 3, 13]. Mr. Lowe testified that he may have surgery for the herniated disc, the timing and the likely outcome of which are unknown at this time. He has been consulting with physicians at the Cleveland Clinic about surgery. The long term outcome of Mr. Lowe's physical condition and its impact on future income is very difficult to ascertain now. Mr. Lowe opined

that there was very little he could do now by way of gainful employment given his physical condition. The medical reports in the record demonstrate that Mr. Lowe will probably be unable to return to work as an RN given the heavy lifting and physical nature of the job. However, the medical evidence does not appear to be conclusive, and the court is not convinced, that Mr. Lowe could not return to light duty office work in the financial services industry, where he also has substantial prior employment experience. [Lowe Trial Ex. #4 at 3-4, #5 at 4 ("[Mr. Lowe] is capable of gainful employment with restrictions")]. Mr. Lowe can drive, he can use a computer, he is educated and he has experience in both the medical and financial services industries.

The associated mental disorder appears to have resulted in some impulsive behavior on occasion, such as gambling, speeding, and extreme phone bills; however, it does not itself appear to impact his future earning capabilities. [Lowe Trial Ex. #13]. Although it requires lifelong treatment, "[p]eople who are treated....often can go back to very high functioning positions." [*Id.*, at 5]. In fact, one physician who examined Mr. Lowe noted that this condition dates back 15 years, which would be during time periods when he was working and functioning at a high level in the workplace.

In terms of personal background, Mr. Lowe is 43 years of age and single. He currently resides in the small town of Bloomville, Ohio with his ward, Logan R. Swank ("Mr. Swank"). Mr. Swank is a developmentally disabled adult of 23 years of age. Mr. Swank appeared in court during the trial. It was apparent from both Mr. Lowe's testimony and Mr. Swank's appearance in court that Mr. Swank will always require a high level of care and supervision, and is unable to support himself. Since Mr. Lowe is not working, he is running a small, informal video rental business for Mr. Swank's alleged therapeutic benefit. The business apparently operates at a loss and seems to be incurring additional unbudgeted expenses, not accounted for on Mr. Lowe's Schedule J. [*See* Lowe Trial Ex. #12].[1]

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[1] The business is also of somewhat questionable legality given the commercial use of videotapes, apparently without permission, and no attention seemingly being paid to sales or other tax issues.

Mr. Lowe's assets are basic and unremarkable. There are no assets, whether exempt or not, which could be liquidated at this time to contribute to repayment of the student loan debts. A second home was sold in 1997 at a small loss. He drives a 1993 model year car, for which he has reaffirmed the debt that is now down to $1,500.00 to $1,600.00. Mr. Lowe and Mr. Swank live in a house owned by Mr. Lowe that he values at $100,000, and upon which he reaffirmed a first mortgage obligation of $103,000.00. Mr. Lowe believes the home has declined in value since 1995, when it had value of $118,000 to $120,000, partly because of a flood. Notwithstanding the home's purported decline in value and the substantial monthly mortgage payment amount of $1,194.00 [Lowe Trial Ex. #12], Mr. Lowe testified that he reaffirmed the debt because he did not think he could get a mortgage anywhere else now and because that was where they lived. He also thought, at the time he reaffirmed the debt, that he would be returning to work soon; although, that has not yet occurred.

Mr. Lowe filed his chapter 7 voluntary petition for relief on December 1, 2000. He received his discharge order on April 6, 2001. Mr. Lowe's Schedule I states he receives $2,216.00 per month in worker's compensation benefits [Lowe Trial Ex. # 11]; however, as discussed above, at trial it was determined that he receives a bi-weekly check for $1,083.00, which totals an average of $2,346.50 per month. So, with the monthly SSI payment for Mr. Swank's support, Mr. Lowe's combined monthly revenue income is closer to $2,900.00 than the $2,761.00 appearing on his Schedule I. [Lowe Trial Ex. # 11]. He does not have health insurance. Medicaid pays Mr. Swank's medical expenses and ORWC pays Mr. Lowe's current medical expenses, to the extent related to his workplace accident.

Mr. Lowe scheduled his total monthly expenses at $2,963.00 [Lowe Trial Ex. #12 (Schedule J)], putting him in a break even posture on a monthly basis according to his budget. The most substantial amount included in that total is the $1,194.00 monthly mortgage payment cost described above. [*Id.*]. Also included in his expense total is $600.00 a month for food, $120.00 a month for transportation and $100.00 per month for auto maintenance, various utilities, and $50.00 a month for

cable television, plus another $25.00 per month for recreation. [*Id.*]. Mr. Lowe testified that the substantial amount of the food budget for two people results because they eat out at restaurants much of the time.

Law and Analysis:

Mr. Lowe asks the court to discharge his student loan obligations based upon the "undue hardship" exception to nondischargeability in 11 U.S.C. § 523(a)(8). The term "undue hardship" is not defined in the statute and neither the Supreme Court nor the Sixth Circuit have formally adopted a standard for determining what constitutes "undue hardship." Although, in at least two separate decisions, the Sixth Circuit approved application of a widely used three part test derived from the Second Circuit case, *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2nd Cir. 1987). *See Cheesman v. Tennessee Student Assistance Corp.* (*In re Cheesman*), 25 F.3d 356 (6th Cir. 1994); *Tennessee Student Assistance Corp. v. Hornsby* (*In re Hornsby*), 144 F.3d 433 (6th Cir. 1998). Other bankruptcy courts within the Sixth Circuit have universally relied on the "*Brunner* test" to determine whether a debtor is entitled to an "undue hardship" discharge of student loan obligations. *E.g.*, *Berry v. Educational Credit Mgmt. Corp. (In re Berry),* 266 B.R. 359 (Bankr. N.D. Ohio 2000); *Graybush v. U.S. Departmtent of Educ. (In re Graybush),* 265 B.R. 587 (Bankr. S.D. Ohio 1999).

Under *Grine v. Texas Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 197 (Bankr. N.D. Ohio 2000), the debtor bears the burden of proving by a preponderance of the evidence each of the following three *Brunner* elements:

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

In *Hornsby*, the Sixth Circuit also directed bankruptcy courts to look to other factors that may be appropriate in a specific case. *Hornsby,* 144 F.3d at 437.

The first prong of the *Brunner* test contemplates that a debtor is first entitled to provide for basic needs for food, clothing, shelter, medical care, and transportation for himself and his dependents, before repaying student loan debts. The starting point for applying the test is therefore an evaluation of income and expenses, focusing particularly on what expenses are necessary to realistically maintain a basic standard of living and then determining whether there is income left over with which to pay student loan debts.

As described above, Mr. Lowe's current monthly revenue is approximately $2,900.00, or approximately $34,800.00 a year in non-taxable income. This amount substantially exceeds the standards established by Department of Health and Human Services' 2002 poverty guidelines of $11,940.00 for a family of two. *See* 67 F.R. 6931 (Feb. 14, 2002); *Hornsby*, 144 F.3d at 436 (Sixth Circuit comparing debtors' income to poverty guidelines); *cf. Salinas v. United Student Aid Funds, Inc. (In re Salinas)*, 258 B.R. 913, 918 (Bankr. W.D. Wis. 2001) (§ 523(a)(8) does not mandate that debtors fall below federal poverty guidelines before a loan can be discharged as an undue hardship exception).

Mr. Lowe's current monthly expenses are approximately the same as his incoming monthly revenue. The court does not doubt that he is in fact making the expenditures reported on Schedule J, and most are not out of line with maintaining a basic standard of living. The court notes that Mr. Lowe sold a second home to reduce expenses. However, the court finds that several of Mr. Lowe's expenses are excessive and could be reduced to leave him with disposable income with which to make some payment on his student loan debt. Specifically, Mr. Lowe's monthly food expense of $600.00 is excessive. Even given Mr. Lowe's current physical and psychological conditions, the court does not accept that Mr. Swank and Mr. Lowe must eat at restaurants everyday, and that Mr. Lowe is not able to shop for food and undertake more basic meal preparation at home. Currently, they are

spending $7,200.00 per year on food. The court finds that $5,200.00 per year is a more appropriate expenditure to maintain a basic standard of living. To the extent that Mr. Lowe is spending funds, at a loss, on the video store for Mr. Swank, the court finds that this is also an expenditure which should not be made at the expense of repayment of Mr. Lowe's student loan creditor.

The court is also very concerned about and somewhat perplexed by Mr. Lowe's housing expense. Mr. Lowe and Mr. Swank could find basic shelter for much less than $1,194.00 a month, although probably not on an ownership basis given Mr. Lowe's present lack of employment. The problem now is that Mr. Lowe has reaffirmed the home mortgage, which seems unwise given the large monthly payments and the alleged declining value of the home. Mr. Lowe has essentially decided on his own to except his mortgage debt from his discharge, and is now to some degree asking his student loan creditor to subsidize his homestead exemption and the accumulation of future equity in his real estate with ongoing mortgage payments, beyond a level required for basic shelter for two adults. The court is also concerned, however, with maintaining a stable living environment for Mr. Swank.

Under the first prong of the *Brunner* test, it is clear to the court that, under Mr. Lowe's current circumstances, he could still afford to make some monthly payment on his student loan debt with some judicious belt tightening, while maintaining a basic and reasonable standard of living. Mr. Lowe has not met his burden of proof under the first prong of the *Brunner* test, because his budget is unreasonable in choices he has made and continues to make. *Cf. Horsnby*, 144 F.3d at 438 ("The Hornsbys do not seem to have minimized expenses in every way possible.").

Under the second prong of the *Brunner* test, a debtor's financial adversity is required to be more than a temporary state of affairs. *Hatfield v. William D. Ford. Fed. Direct Consolidation Program* (*In re Hatfield*), 257 B.R. 575, 582 (Bankr. D. Mont. 2000). The purpose of this requirement is to give effect to the clear congressional intent – exhibited by use of the word "undue" in § 523(a)(8) – that a student loan obligation be more difficult to discharge than that of other nonexcepted debts.

Rifino v. United States (*In re Rifino*), 245 F.3d 1083, 1088-89 (9th Cir. 2001). This is a difficult factor to evaluate at this time in Mr. Lowe's case. His earned income has declined since and as a result of his injury. On the other hand, given the non-taxable nature of his current revenue, it does not appear that Mr. Lowe's monthly cash flow is substantially less than when he was working and paying taxes and now he has discharged a substantial amount of unsecured debt. Nevertheless, Mr. Lowe's future income prospects are uncertain. The court cannot find a basis in the record to hold at this time that his disability is permanent; no government entity has yet so determined. Surgery is a possibility, the impact of which is unknown and unknowable at this time. Mr. Lowe contends that he will not be able to return to work, and it does seem so with respect to his profession as an RN; however, the present determination made by the OBWC is that his injury is not a permanent disability. Even if Mr. Lowe does return to work, the court finds that it is unlikely that his future income will exceed the $35,000 to $40,000 level, which is essentially the highest income level he has reached. Also, if Mr. Lowe's injury is later determined to be a permanent disability, a lump sum settlement award from OBWC is foreseeable, with monthly income then reduced.

Under the circumstances, the court finds that Mr. Lowe has established that his income will not be subject to substantial increase in the future, and that it is more likely that he will have some decrease rather than increase. This is not the kind of case, about which Congress has expressed particular concern, where a debtor obtains an education and then seeks to discharge the associated liabilities while the prospect of the increased financial benefits of the education are just over the horizon.

Under the third prong of the *Brunner* test, the court finds that Mr. Lowe has not made a good faith effort to repay the loans. The evidence shows Mr. Lowe had a good income in the years 1997 through 2000. However, during this time period, even before Mr. Lowe was injured at work, he failed to make payments on his student loan obligations. Mr. Lowe's testimony on his efforts to repay is vague at best. He did repay two other student loans, which shows that he is not just ignoring the

liabilities associated with his education altogether. Nevertheless, it is clear that he has put other priorities of life ahead of repaying the rest of his student loan debt, including incurring a substantial mortgage obligation in 1995 and taking a gambling vacation to Casino Windsor.

Mr. Lowe has thus failed to carry his burden of proof on all three elements of the *Brunner* test. However, the court has identified another factor unique to Mr. Lowe's situation that bears on the question of undue hardship. *Hornsby,* 144 F.3d at 437. If the entire student loan amount remained nondischargeable, absent voluntary repayment by the debtor, ECMC would be left to ordinary creditor's remedies to recover the debt. The available remedies would ultimately include garnishment of wages. There are limitations built into federal law to protect wages from garnishment to repay student loan debts beyond 10% of disposable pay, 20 U.S.C. § 1095a, also so as to maintain a basic standard of living for the debtor. SSI payments are also protected from creditor seizure. 42 U.S.C. § 407. In contrast, however, Mr. Lowe's current revenue stream is dependant upon worker's compensation payments. There is further the prospect of a lump sum payment in the future if Mr. Lowe is determined to be permanently disabled. Surprisingly, under Ohio law, workers compensation payments are less protected from creditors than are wages.

There is an exemption for workers compensation payments in O.R.C. § 2329.66(A)(9)(b), which exempts a debtor's interest in "[w]orker's compensation, as exempted by section 4123.67 of the Revised Code" from garnishment, execution or attachment. In turn, O.R.C. § 4123.67 exempts "compensation *before* payments...from all claims of creditors and from any attachment or execution" (Emphasis added.). The Ohio Supreme Court has strictly construed this exemption to mean that, once benefits are actually paid to the claimant, they are no longer exempt from attachment. *Ohio Bell Telephone Co. v. Antonelli*, 504 N.E.2d 717 (Ohio 1987). In this case, if ECMC is in a position to take a judgment against Mr. Lowe and commence collection, it would be able to reach Mr. Lowe's workers compensation benefits once they are paid to him, including any lump sum settlement.

That would be devastating to both Mr. Lowe and Mr. Swank and their ability to live basically, as such streams of income or any lump sum payment are intended to substitute for wages he cannot earn due to disability. The court can say without reservation that unrestricted seizure of substantial parts of Mr. Lowe's monthly workers' compensation payments would be an undue hardship to him, as would seizure of any lump sum payment that might be made in the future.

The court faces a difficult legal decision based on the facts of Mr. Lowe's case, one faced by most bankruptcy courts dealing with undue hardship issues. Even under his present difficult medical and financial circumstances, the court believes that Mr. Lowe has, and has had, the ability to repay at least some, but probably not all, of the debt he owes to ECMC over the twenty years reasonably remaining in his working life. On the other hand, his future health and income status is uncertain. It probably will not improve much and may deteriorate further. Then there is the added twist that forced collection as would be permissible if the debt is not discharged would seemingly be more detrimental than if Mr. Lowe were earning wages or a salary. Even so, as many courts have noted and struggled to work through, § 523(a)(8) simply does not on its face permit the kind of equitable remedy, such as partial discharge, that might address all of these concerns. *e.g., Pincus v. Graduate Loan Ctr. (In re Pincus)*, 280 B.R. 303 (Bankr. S.D.N.Y. 2002) (under factual circumstances similar to Mr. Lowe's case, the court rejected an application of the undue hardship exception and held that the Bankruptcy Code does not permit partial discharge or other equitable remedies, which are "pure judicial activism").

The Sixth Circuit has, however, rejected such a strict interpretation by evaluating undue hardship under § 523(a)(8) in light of and in conjunction with 11 U.S.C. § 105. In *Cheesman*, the Sixth Circuit permitted a bankruptcy court to revisit the status of undue hardship factors 18 months after trial under the authority of § 105. More recently, in *Horsnby*, the Sixth Circuit held that the bankruptcy court must consider a range of partial discharge remedies under § 105, noting that a repayment schedule could be changed, interest or attorneys fees could be excused, payment can be deferred, or a case can be

reopened. The bankruptcy court in *Hornsby* had discharged a student loan debt on the grounds of undue hardship, under circumstances where it ultimately appeared to the Sixth Circuit that all three prongs of the *Brunner* test were not really met, but that requiring repayment of the entire debt would be an undue hardship, if not an impossibility. Thus, *Hornsby* is similar to this case. The Sixth Circuit reversed the bankruptcy and district court decisions, remanding the case with directions to "fashion a remedy [under § 105] allowing the Hornsbys ultimately to satisfy their obligations to TSAC while at the same time providing them some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances." *Hornsby,* 144 F.3d at 440. Since *Hornsby*, bankruptcy courts in the Sixth Circuit, in contrast to bankruptcy courts in some other circuits, have consistently granted partial discharges and developed other remedies in undue hardship cases presenting situations similar to Mr. Lowe's circumstances. *E.g*., *Afflitto v. United States (In re Afflitto)*, 273 B.R. 162 (Bankr. W.D. Tenn. 2001) (discharge of accrued and accruing interest, abatement of repayment for one year and opportunity to request further hearing after one year).

Foreshadowing the remedy analysis that *Hornsby* directs this court to undertake, the parties have submitted stipulated mathematical computations showing the following monthly repayment scenarios [Doc. # 32]:

$70,000.00 repaid at:

0% - 20 years = $291.67

9% - 20 years = $629.81

$25,000.00 repaid at:

0% - 20 years = $104.17

9% - 20 years = $224.93

Repayment of $70,000 at 9% interest over 20 years appears to represent full repayment of Mr. Lowe's obligations. A monthly payment of $629.81 per month against Mr. Lowe's existing budget, even with reductions in the areas already identified by the court, would deprive Mr. Lowe and Mr. Swank of a basic standard of living, especially given the uncertainties about his medical condition, future income levels and Mr. Swank's inability to ever provide for himself.

The court concludes that, notwithstanding Mr. Lowe's failure to prove all three prongs of the Brunner test, he has shown by a preponderance of the evidence that circumstances constituting undue hardship exist if he is required to repay *all* of his debt and accruing interest.[2] Therefore, even though Mr. Lowe has been unsuccessful in establishing his right to a total discharge, he still has demonstrated sufficient hardship to justify an equitable remedy. *Afflitto* at 173. The equities weigh in favor of a partial discharge of the Debtor's student loans under the foregoing facts and circumstances, as well as the imposition of some structural limitation on ECMC's future collection effort given the present nature of Mr. Lowe's income stream from OBWC.[3]

The court concludes that Mr. Lowe can repay at least $2,000.00 per year, or a total of $40,000.00, toward his obligation to ECMC. Reduction of his food expenditures alone would appear to provide the budget room for repayment at that level, but it will be up to Mr. Lowe to reorder his existing budget choices to find the funds with which to do so. Given Mr. Lowe's age, a repayment period

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[2] In multiple loan situations, like here, another approach bankruptcy courts have taken is to apply the undue hardship standard on a loan by loan basis, and not to the aggregate debt. *E.g., Hinkle v. Wheaton College (In re Hinkle),* 200 B.R. 690, 693 (Bankr. W.D. Va. 1996). That legal analysis makes practical sense here, where the loans do not appear to have been consolidated by agreement of the parties into a single debt, and also where all of the loans were extended by the same lender and now held by the same guarantor. [Doc. #28]. On that basis, Mr. Lowe can repay the first 6 loans stipulated to by the parties [*Id.*], including principal, interest and costs, but not interest as it continues to accrue. The balance of the individual loan debts would represent an undue hardship to him to repay. This legal analysis breaks down, however, where the debt is consolidated or where different lenders are involved. *Pincus*, 280 B.R. at 312-13. There is no obvious principled basis upon which to make distinctions about which loans can be paid without undue hardship and which cannot. *Id.*

[3] The court also notes that, in the event of Mr. Lowe's total permanent disability, there are nonbankruptcy avenues for discharge of his student loan debt that can be pursued.

of 20 years is appropriate, terminating at about the time he would normally be expected to retire. The balance of the principal remaining, as well as all interest and costs, will be discharged under the undue hardship standard. The payment shall be made on an annual basis at no interest, with the first payment due 13 months from the date of this entry, whether a request for further hearing, as provided below, is pending or not. However, due to the fact that the court found Mr. Lowe's prior repayment history did not satisfy the third prong of the *Brunner* test, it is necessary and appropriate to build some incentive to Mr. Lowe to make the required payments into the remedy fashioned herein. If Mr. Lowe fails to make any of the payments required by this decision, the total unpaid balance on his student loan obligations, including interest that would otherwise accrue, will become a nondischargeable debt for immediate collection by ECMC.

Finally, the court is concerned about the present uncertainties with Mr. Lowe's medical condition, the potential need for surgery and the long term impact on his income. Therefore, either party may move the court for a further hearing, at the end of one year following entry of this decision, if Mr. Lowe's circumstances have materially deteriorated or improved so as to justify a modification of the repayment schedule determined above. In the absence of such a motion, the partial discharge and repayment schedule set above shall become a final decision and judgment.

Dated: ______________________________

Mary Ann Whipple
United States Bankruptcy Judge