UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

****

In re:

DAVID ALLEN LIEBERMAN and
TRACEY ANN GIBBONS, MEMORANDUM DECISION

Debtors.

****

DAVID ALLEN LIEBERMAN,

Plaintiff, BKY 00-50978

v. ADV 02-5018

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Defendant.

****

At Duluth, Minnesota, this 3rd day of June, 2003.

This adversary proceeding for determination of dischargeability of debt under 11 U.S.C. §523(a)(8) came on before the Court for trial. The Plaintiff ("the Debtor") appeared by his attorney, David G. Keller. The Defendant ("ECMC") appeared by its attorney, Christopher M. McCullough. Upon the evidence received at trial and the arguments and memoranda of counsel, the Court memorializes the following decision.

PARTIES

The Debtor filed a voluntary petition under Chapter 7 on October 11, 2000. To finance his education at Seattle University School of Law in 1991-1994, the Debtor had taken out a number of student loans guaranteed by the United States through its Department of

24-1

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 06/03/03
Patrick G. De Wane, Clerk, By jrb

Education. The Debtor later consolidated these loans through Sallie Mae, Inc. For his bankruptcy filing, he duly scheduled the contemporaneous holder(s) of the note(s) on those loans. The Debtor received a discharge under Chapter 7 on January 9, 2001.

Through intervening parties' performance on guaranties and assignments, ECMC presently holds all rights to payment under the note that evidences the consolidation of the Debtor's educational loan obligations.

GOVERNING LAW

This adversary proceeding sounds under 11 U.S.C. §523(a)(8). That statute creates an exception from discharge in bankruptcy "for an educational . . . loan made, insured or guaranteed by a governmental unit . . ." This exception from discharge is self-executing, and does not require a court adjudication to make it effective. H.R. REP. No. 595, 95th Cong. 1st Sess. 79 (1977). The Debtor, however, maintains that allowing this exception to lie would "impose an undue hardship on" him and his dependants, within the meaning of the later text of §523(a)(8). Thus, he seeks a determination that his debt to ECMC was dischargeable, and was in fact discharged, in his bankruptcy case. As the proponent of an exception to the exception from discharge, it is his burden to prove his entitlement to it. *In re McCormick*, 259 B.R. 907, 909 (B.A.P. 8th Cir. 2001).

A determination of undue hardship under §523(a)(8) is an issue of law. *In re Long*, 322 F.3d 549, 553 (8th Cir. 2003). In this Circuit, this issue requires an examination of all of the facts and circumstances that bear on the debtor's ability to make payment on account of the educational loans in question. *In re Long*, 322 F.3d at 553; *In re Andrews*, 661 F.2d 702, 704 (8th Cir. 1981). Facts relevant to this inquiry include:

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 facts and circumstances relevant to the debtor's ability to pay the debt in question.

In re Long, 322 F.3d at 554; *In re Andrews*, 661 F.2d at 704. *See also In re Andresen*, 232 B.R. 127, 132 (B.A.P. 8th Cir. 1999) (cited with approval on this point in *Long*, 322 F.3d at 554). Where a debtor will have sufficient funds from income or other sources to cover ongoing payment on educational loans, while maintaining a "minimal standard of living," the debtor has not proven undue hardship and the statutory exception to discharge will continue to lie. *In re Long*, 322 F.3d at 554-555.

FINDINGS OF FACT

The Debtor is a 48-year-old resident of rural Sauk Rapids, Minnesota. He has been married to Tracey Ann Gibbons since 1981. They have two children, Maura and Max, ages 19 and 14 respectively. Both Maura and Max reside in the household of the Debtor and his wife, and will continue to do so for the foreseeable future.

The Debtor holds three separate university degrees: a Bachelor of Arts, with a major in Foreign Languages and Fine Arts, received from St. Cloud (Minnesota) State University in 1980; a Bachelor in Health Sciences, *magna cum laude*, received from Duke University in 1982; and a Juris Doctor, *cum laude*, received from Seattle University School of Law in 1994.

The Debtor's B.H.S. credential enabled him to become licensed as a physician's assistant, a paraprofessional position that carries significant responsibilities in direct patient care in medicine. After receiving the degree from Duke University, the Debtor went through a three-month internship at a rural hospital in Washington State. He then was employed on a constant basis as a physician's assistant in various clinics in Alaska, Maine, and Washington State from 1982 until 1996.

While living and working in the Olympia, Washington, area in the early 1990s, the Debtor decided to go to law school. At trial, he testified to being motivated by "the obvious financial reasons, increased opportunities." This coincided, however, with his desire to learn more effective advocacy skills for a personal reason: his daughter Maura had been born with significant mental and physical deficits of genetic origin, and as she entered the middle years of childhood he and his wife had concluded that it "would be a lifelong battle" to guide her through the educational and social-services systems to her best advantage.

The Debtor retained his full-time employment as a physician's assistant with the Group Health Co-op of Puget Sound throughout his law school career. He took out government-insured loans to cover his educational and family living expenses, to the extent his wages were not sufficient. After graduating from law school and passing the Washington State bar exam, he went through an "intense" job search in the Olympia area. He found that starting salaries for associate attorneys in the area law firms were insufficient to allow him to support his family and to make payment on his educational loans. Thus, he kept his position as a physician's assistant, with its salary approaching $70,000.00 per year, and resolved to make use of his new legal credential in a different way. He started a solo private practice out of his home, with the thought of building up a legal clientele. He expected to gradually reduce his hours in the medical field as his income from the practice of law increased. He assumed that he could immediately generate net income from the law practice of at least $600.00 per month, sufficient to keep current on his educational loan payments.

As the Debtor ruefully admitted at trial, it did not work out that way. Over the course of eighteen months, he opened about a half-dozen client files, and had a gross income of approximately $2,000.00 from them. He abandoned his plans to practice law, and continued his employment as a physician's assistant.

In the summer of 1996, the Debtor and his wife decided to move back to central Minnesota, where he had grown up. Their motivations evidenced mid-life concerns that are quite common currently: the desire to help his parents as their health was failing; the wish to promote a relationship between his children and his parents; and a return to personal roots. Within several months, the Debtor obtained employment as a night-shift physician's assistant with the Express Care Center of the St. Cloud Medical Group, and he and his wife purchased the home in rural Sauk Rapids in which they currently reside.

His new job paid less than the position he left in Olympia, but he accepted it as "a way to get out here." The Debtor found the work "fast-paced." Apparently, he was only one in a chain of medical professionals who were to see each patient during a given appointment. This required him to closely coordinate with the others as to the limited amount of time he was to spend with patients. Within a few months, he had increasing difficulties "keeping up" the pace; he began experiencing fatigue and symptoms of depression. Ultimately, he realized that he was an alcoholic and was chemically dependent.

By then--August, 1997--the St. Cloud Medical Group had terminated his employment due to the behavior he had exhibited while he was "decompensating." The Debtor then went through a month-long in-patient treatment regimen for chemical dependency. At trial, he attested to having maintained sobriety since.

During the surrounding nine-month period of unemployment, the Debtor and his family received public assistance benefits and financial help from his parents in meeting their household expenses. He voluntarily reported his chemical dependency and treatment to the state licensing authorities, and went through a program of counseling and supervision. He was reissued a physician's assistant license that was provisioned on appropriate disclosure to any prospective medical employer.

After going through an extensive search for employment through the Work Force Center in St. Cloud, the Debtor was hired by Allina Medical Clinic in Buffalo, Minnesota, as a family practice physician's assistant, in the spring of 1998. The issue of the speed with which he was seeing patients arose at this employment as well, but the Debtor retained his job for over two years. Ultimately, though, he was terminated in early October, 2000, after an exchange of adversarial e-mail communications with a doctor.[1]

Since then, the Debtor has been unable to obtain employment in the medical field, despite an ongoing and "intense" search over the area within a 100-mile radius of St. Cloud, inquiries to employers in a number of other states, and "quite a few" initial interviews.

In March, 2001, he commenced law-related employment as a reference attorney with West Group, the large legal publisher, at its headquarters in Eagan, Minnesota. From a starting salary of $35,000.00 per year, he has been advanced to the level of $42,000.00, plus an annual increment of $800.00 for participating in a "speciality team" on bankruptcy law. He

1 Allina Health Systems contested the Debtor's subsequent application for unemployment compensation on the ground that he had been terminated "for cause." A state hearing officer found, however, that there had been no record of "ongoing professional problems" with the Debtor's performance at Buffalo, and declined to hold that he had been terminated "for cause."

receives a palette of benefits, including subsidized programs of health, dental, and vision-care insurance. The Debtor is "grateful to have" this employment. At present, he intends to keep it, though he does not anticipate any significant career or salary advancement in it for the near future. While employed at West Group, the Debtor has tried to find additional work, including contract legal work, a part-time position as a physician's assistant, and pharmaceutical sales. He has not been successful. The Debtor's license to practice law in Washington State is presently on an inactive status. He registered to take the Minnesota bar examination at its February, 2003 sitting and he paid for an associated bar review course.

While still in Olympia, the Debtor was diagnosed with Hepatitis C, a chronic and active disease of the liver characterized by fatigue and progressive organ damage. The Debtor's strain of the disease does not respond well to treatment with medication, and depression is among the side-effects of the drugs that would be prescribed for him. In consequence, the Debtor has limited the amount of medication he has taken. He faces the possibility of having to undergo a liver transplant. There is no evidence that the condition presently impairs his ability to function in either of his professions, or that it will in the foreseeable future.

The Debtor's wife is an insulin-dependent diabetic. She has well-maintained a regimen of self-care for the condition, with only one crisis event since her diagnosis. As yet, she has not experienced the compromised vascular function or neurological and visual impairment that accompany more advanced stages of the disease. She is not presently employed outside the home. She takes on-call assignments as a classroom assistant in the Sauk Rapids public schools, and has done some seasonal work in a local greenhouse. She has looked for employment since the spring of 2002, primarily in educational and ECFE (Early

Childhood Family Education) programs. Over a period of nearly thirty years, she has accumulated about seventy-five percent of the course work to obtain a bachelor's degree.[2] The Debtor identifies the need to provide care for their daughter Maura as the primary impediment to his wife being employed on a more regular or full-time basis.

There is no evidence that the Debtor's wife's medical condition would prevent her from working and earning at least as much as she has done in the recent past, or that it will in the foreseeable future.

The Debtor's wife took out educational loans to finance her coursework over the years; the current balance on them is between $18,000.00 and $19,000.00. She is currently making payment on them, in the amount of approximately $200.00 per month. This comes out of the household fisc. The Debtor did not testify to any plans for his wife to complete her degree requirements, or any means by which she would pay for it.

The Debtor's daughter Maura was born with Trisomy 9p, a chromosomal abnormality that has inflicted a number of severe impairments on her: cardiac abnormalities; slow physical growth; delayed development of physical skills and speech; moderate mental retardation; hearing, cognitive, and emotional impairment; and attention-deficit disorder (ADD). Due to her behavioral deficits, she requires around-the-clock monitoring, cannot be left alone, and will not be capable of living independently.[3]

---

2 The Debtor did not indicate her major.

3 One of the Debtor's motivations in purchasing a rural home with acreage upon his family's move to Minnesota was Maura's tendency to wander around the more densely-populated neighborhoods in which they had lived in the past, entering people's homes uninvited and causing disruption.

Maura remains in a full-time day program at the senior high school in Sauk Rapids, to which she will be entitled under Minnesota law until age twenty-one. She requires medication for ADD and will have to undergo further cardiac surgery when it is certain that she has reached her maximum growth. The Debtor and his wife have not yet resolved on arrangements for her living and care when she can no longer attend school. They hope to avoid placing her in a residential facility by enrolling her in sheltered-workshop employment and keeping her in their household. Maura receives Supplemental Security Income of $331.00 per month on account of her disabilities. The Debtor and his wife use these funds to help meet the cost of caring for her.

Per the Debtor, his son Max is "by far the healthiest" member of the family, with no identified physical or mental condition that requires significant care or treatment at present.

The Debtor's current regular monthly household income, that which he can anticipate receiving with relative certainty, is as follows:

Debtor's net wages	$2,883.00
Debtor's employee incentive bonus	50.00[4]
Maura's SSI	331.00
Wife's net income	400.00[5]

4 Though the Debtor testified that in any given year this bonus was contingent on West Group's overall profits, the balance of his testimony suggested that he can reasonably expect to receive an annual bonus that equates to at least this amount on a monthly basis.

5 This sum is obtained by starting with the mid-point of the amount of gross income that the Debtor stipulated that his wife has received when she has been employed outside the home, $6,500.00 per year. Twenty-five percent (25%) is deducted as an average amount for the various payroll withholding taxes. It is reasonable to expect the Debtor's wife to take work outside the home, at minimum on the on-call and seasonal basis in which she has engaged in recent years.

Prorated state and federal tax refunds	105.00[6]
Prorated property tax refunds	41.00[7]
TOTAL:	**$3,810.00**

Per the parties' stipulation of fact, the Debtor's current actual monthly household expenditures are as follows:

Mortgage:		$1,460.00
Utilities:		
	Satellite dish	$ 47.00
	Cell phone	80.00
	Gas (propane) heat	150.00
	Telephone (land line)	49.00
	Garbage removal	35.00
	Other (septic tank and driveway plowing in winter)	75.00
Automobiles:		
	Truck payment (2000 Ford F-150)	$ 244.00
	Car payment (1999 Chevy Malibu)	157.00
	Licensing	7.00
	Auto insurance	128.00
	AAA membership	8.00
Household items:		
	Medical co-pays	$ 15.00
	Prescription co-pays	122.00
	Personal care	65.00
	Entertainment/dining out	25.00
	School lunches	120.00
	School supplies for children	100.00
	Sam's Club membership	4.00

---

6 This is calculated on the basis of the amounts the Debtor and his wife received for tax year 2001. Their experience that year with earnings, withholdings, and deductions is the best predictor of their future realizations from these sources. Under the evidence of record, it is reasonable to assume the following: the Debtor will retain his job with West Group; his wife again would take the sort of employment she did during the year before trial; and each would receive no more than modest increases in rates of compensation. That assumption has been made for the fact-finding here.

7 This assumes that the Minnesota State Legislature will authorize further such refunds, and that the Debtor and his wife will qualify for them as they did for 2001. The Debtor did not testify to any reason not to make this assumption.

Other:	
Tracey's student loan payments	$ 200.00
Credit card minimum payments	55.00
TOTAL:	**$3,146.00**

When the Debtor and his wife moved their family to Minnesota, they decided to settle on a larger plot of land somewhat outside of town, in an effort to maintain safer and more controlled conditions for Maura. They found the dwelling in which they now live; after "protracted and antagonistic negotiations" they agreed to pay $161,000.00 for it and 8.5 acres of land. They obtained mortgage-secured financing to cover $152,000.00 of the purchase price and put in the rest from their own funds. Under the circumstances,[8] this decision was neither unreasonable nor irresponsible.

The house itself has four bedrooms and three and one-half bathrooms, and has an area of approximately 2,800 square feet. In early 1998, it suffered water damage to floors and support joists due to a plumbing leak. Due to a lack of funds and the diversion of an insurance award to the making of mortgage payments during the Debtor's unemployment, the Debtor and his wife have not had the damage repaired. They have a recent estimate for the work, in the amount of approximately $7,400.00. The Debtor also testified in a general fashion to other problems with the house, apparently due to moisture condensation in the attic, though he did not quantify the effects of these.

The Debtor and his wife got mortgage refinancing in September, 2002, receiving $192,000.00 on the strength of an appraisal indicating a home value of $240,000.00. The Debtor and his wife received net cash proceeds of $36,000.00 from the

[8] Those circumstances include their reasonable assessment of appropriate residential surroundings for Maura; the offer of a job to the Debtor, salaried at between $67,000.00 and $68,000.00 per year; and the Debtor's contemporaneous currency in payment on his educational loans.

transaction, leaving the home encumbered by a mortgage securing approximately $156,000.00 of debt. The terms of the refinancing left their monthly payment about even with the previous amount.

Between October 9 and mid-December, 2002, the Debtor and his wife spent approximately $16,000.00 of the proceeds on more than a dozen family and household purposes: attorney fees for a court proceeding to make them Maura's legal guardians; expenses related to the Debtor's application to the Minnesota bar and maintenance of his existing professional licenses; new tires for their 1999 Chevrolet Malibu automobile and a new washer and dryer for the home; payments on a homeowner's insurance premium, real estate taxes, and a filling of the home's propane tank; two regular mortgage payments; installation of carpeting in an area in the house; and clothing and new eye glasses for family members. With the possible exception of the carpet, there is no basis in the record to conclude that any of these expenditures were not necessary. The Debtor stated that he and his wife simply had not been able to make them previously. He attributed this to shortfalls of income over other necessary expenses in the recent past.[9]

The Debtor and his wife own two motor vehicles, a 2000 Ford F-150 pickup truck and a 1999 Chevrolet Malibu automobile. Both are encumbered on purchase-money financing, with monthly payment obligations as previously noted. The Debtor purchased the pickup truck used and with some cosmetic hail damage, through a "phenomenal deal" arranged by his brother; it replaced a used and aging Mazda van of high mileage on which maintenance expenses had been high. The Debtor purchased the truck for its reliability under severe weather conditions in a rural Minnesota environment, and to enable him to do his own

[9] ECMC did not produce a bit of proof to counter this point, no matter how summary the Debtor's testimony was on it.

snow removal once he acquired a plow. The Debtor and his wife purchased the Chevrolet used, again through his brother, for $5,000.00, intending it for daily use in his commute of 100 miles one-way to Eagan. The Debtor has used it in this fashion, to reduce this work-related expenditure without incurring any substantial maintenance expense thus far. Given the Debtor's rural residence, the severity of Minnesota winters, his long commute, and the possibility of medical emergencies within the family, the choices of vehicles are not out of line. The Debtor and his spouse seem to be the sort that practice long-term ownership of vehicles, to wring the value out of them.

The Debtor and his family resort to a St. Cloud-area food shelf to meet their nutritional needs when money runs out. They also do most of their clothing acquisition through a Good Will thrift store, turning in items they no longer need and purchasing used goods from it. They acquired two cell phones on a single account when the Debtor was required to maintain one for his employment with Allina Health Systems. Not unreasonably, they have kept them for safety and security purposes due to his extended daily commute. The Debtor has actually used a cell phone for road emergencies and breakdowns on at least four occasions since he took employment with West Group. They also use the "unlimited access" function of their cell phone service to avoid long-distance charges on their installed phone line at home; they have maintained the latter for reliability, again not unreasonably.

Lastly, the Debtor justifies his family's use of basic-level satellite television service on the grounds that cable access is not available for their home, and aerial reception is not reliable. The basic thought, moreover, is that by providing a significant diversion for a child with ADD the entertainment keeps her more tractable and reduces family distress.

Under all of the circumstances, and particularly given Maura's condition, this conclusion and this expenditure are not unreasonable.

The Debtor remained current in payment under the consolidation of his educational loans until the time his employment with St. Cloud Medical Group was terminated, in the late summer of 1997. Since then, he has applied for and has been granted hardship deferments on his payment obligation, under applicable regulation.

As of December 2, 2002, the outstanding balance on the Debtor's debt to ECMC was $87,348.16 in principal and accrued and unpaid interest. Interest continues to accrue at the rate of $18.45 per diem. In connection with the litigation of this adversary proceeding, ECMC advised the Debtor on November 15, 2002, that it would waive its right under 34 C.F.R. §682.402(i)(1)(v) to recover certain costs of collection from him, which it had calculated at the amount of $20,728.25. This would result in a liability of $87,348.16 as of December 2, 2002, with interest accrual of $3,357.90 through June 2, 2003, for a total of $90,706.06.

Under federal statute and regulation, substantial educational loan debt can be consolidated and reamortized over extended period of time through the William D. Ford Program. Enrollment in the program can result in an advantageous interest rate. The program has four different plans. According to his family size, income, and total loan obligation, the Debtor is eligible to participate in the "extended payment" plan. Assuming a continuing waiver of ECMC's collection costs, the Debtor would be eligible to extend payment of the balance as of December 2, 2002, over a thirty-year period, with a monthly payment obligation of $638.09.

ANALYSIS AND CONCLUSION

As the governing precedent now stands,[10] there is only one defensible outcome. The Debtor did not meet his burden to establish undue hardship, the statutory exception to discharge must continue to lie, and the Debtor will not be relieved of liability on account of the educational loans on which ECMC is the present obligee.

This result is driven by the core fact, which is the income surplus shown by measuring the Debtor's household income against his family's necessary and reasonable living expenses. It is cemented by the gloss that the Bankruptcy Appellate Panel put on the Eighth Circuit's pronouncements in *Long*, in its opinion on remand in that same case, 292 B.R. 635 (B.A.P. 8th Cir. 2003). The decision on remand does not enunciate it with pinpoint certainty, but the B.A.P. obviously envisions that payment restructuring under the William D. Ford programs is to be factored into the ability-to-pay determination. It is clear enough from the opinion that when a debtor is eligible for such an accommodation, the periodic payment

---

10 It could be said without exaggeration that the law governing this matter went through some definitive development during the several months since the trial. (The deferral of this decision was prompted by the very possibility of that; *Long* was submitted on appeal several months before the trial, and the Eighth Circuit issued its opinion several months after the trial.) Thus, the "undue hardship" rationales of many of the cases cited by both sides in argument became chaff in the wind; these included those of the undersigned in *In re Frech*, 62 B.R. 235 (Bankr. D. Minn. 1986), *Shoberg v. Minnesota Higher Education Coordinating Council*, 41 B.R. 684 (Bankr. D. Minn. 1984), and *Cossette v. Higher Education Assistance Foundation*, 41 B.R. 689 (Bankr. D. Minn. 1984). In *Long*, the Eighth Circuit abjured the bankruptcy courts to eschew the several variant tests framed by other courts, trial and appellate, and to apply the "less restrictive approach" of *Andrews*, the totality-of-the-circumstances test. 322 F.3d at 555. The derivative message to counsel is unmistakable: argument based on any test other than the *Andrews*/*Long* one is not to be recognized. Past published jurisprudence from this District and Circuit that is to any other effect is a matter for legal historians alone. As the Eighth Circuit would see it, our Bankruptcy Appellate Panel had gotten it right, in *Andresen* and succeeding decisions. *See In re Andresen*, 232 B.R. at 139; *In re Cline*, 248 B.R. 347 (B.A.P. 8th Cir. 2000); *In re Svoboda*, 264 B.R. 190 (B.A.P. 8th Cir. 2001); *In re Ford*, 269 B.R. 673 (B.A.P. 8th Cir. 2001).

under an available restructuring is the amount to be compared to the household income surplus and any other means for repayment. 292 B.R. at 638 (concluding that debtor there would not undergo undue hardship "if required to repay the loans under the Income Contingent Repayment Plan" of the Ford program).

Here, the basic evidence going to the actual expenditures of the Debtor's household is essentially uncontroverted; in the main, it was stipulated. ECMC's counsel made much conclusory (and accusatory) argument that the expenditures under various line-entries were not "necessary." However, his client did not produce any evidence of other options that would be more frugal, and yet meet the unique needs of the Debtor's dependents.[11] When all of those expenses are tallied, assuming some leeway for anticipated future needs like vehicle replacement and home maintenance, they ring in at a total that is materially less than the amount of the net monthly income that can fairly be attributed to the Debtor's household for the foreseeable future. The difference is about $660.00 per month, on average. This is a bit more than enough to fund a restructured satisfaction of the Debtor's full obligation of

---

11 The reasonableness of other expenditures has been given judgment earlier, but it must be observed: ECMC's strong insinuation that the Debtor was enjoying some sort of luxury in his family's choice of homestead was particularly noisome. The location and size of the property were certainly not those of some large country estate. The Debtor's motivations in choosing the particular property were not tainted by any wish to hide value from his creditors, or to enjoy extravagance. The choice was reasonably motivated, at least in part, by a wish to shelter Maura, a vulnerable child, and to minimize the intrusiveness of her presence in a community. It is one thing for administrators within ECMC to make blithe judgments about such matters, from their cool distance; it is entirely another to have to cope with the daily manifestations of multiple impairments in the psychological makeup of a dependent loved one. One can fairly take a page from the tenor of the Bankruptcy Appellate Panel's decision in *Andresen*: in addressing the many aspects of a debtor's career elections and employment path, we must take the debtor as we find him or her, without moralizing on what could have been done at past branching points in life. 232 B.R. at 137-139. Tempered with some discretion, the same spirit of lenity can be applied to other lifestyle choices that were motivated by the objectively-manifested special needs of dependents.

principal and interest on his educational loans, over the thirty years contemplated by the extended-payment option under the Ford program. The standard of living that the Debtor and his family maintain is something more than "minimal"--the outer boundary contemplated in *Long*, 322 F.2d at 554. Thus, nothing more is necessary to support a ruling. The Debtor is not entitled to an exception from the exception of §523(a)(8), and his debt to ECMC will remain nondischargeable.

This does not rule out some recognition of the uneasy financial balance that the Debtor and his family will have to maintain for decades to come, unless something comes into the picture to significantly increase household income. There probably will be some "hardship" from time to time; the fact that it will not be "undue" under the statute does not mean it will not occur. Because of that, and because this is a human story as well as a legal contest, it is appropriate to make a few observations as to salient facts, circumstances, and aspects of each side's argument. There also is a bit of value in pointing out the sanctimony of some of ECMC's subsidiary positions--if only to offer a little salve for the Debtor's loss after a hard fight.

First, with expressions of upright indignation, ECMC took great issue with the fact that the Debtor and his wife had refinanced their home mortgage during the pendency of this litigation, extracted some $36,000.00 from the property's equity appreciation, and then spent close to half of that amount during the several months before trial. The argument was, in part, a bid to tar the Debtor as self-indulgent, or wasteful of his ongoing means, but it did not work to any great success.[12] ECMC's other point in dwelling on this seemed to be that

[12] With the possible exception of some replacement carpeting, every one of the expenditures was for a household necessity, satisfaction of which had been deferred for months. In addition, as the Debtor testified, intervening drops in interest rates kept the post-refinancing mortgage payment "low," and comparable

the Debtor should be deemed to retain the full amount of the loan proceeds, to pay down his educational-loan debt; the thought was that the resulting lesser balance would mean a smaller monthly payment under Ford-program restructuring, which should be deemed to be the periodic payment considered for the ability-to-pay inquiry.

This was at best an attempt to be clever, but in a shallow way--and one that ignored the ethos of *Andrews*, *Long*, and especially the portion of *Andresen's* rationale that rejected those "undue hardship" formulations that had concentrated on the enhancement of a debtor's vocational profile, actual or hypothetical, that had been financed by the loans in question. *See In re Andresen,* 232 B.R. at 137-139 (recognizing "policy analysis" of such a factor in alternate three-part test first formulated in *In re Johnson*, 5 B.C.D. 532 (Bankr. E.D. Pa. 1979), and rejecting it as beyond the scope of the articulation in *Andrews*).

Simply stated, one must take the debtor in an educational-loan dischargeability proceeding exactly as he presents himself, vocational profile, medical condition, net worth, actual earnings, family responsibilities, and all. Then, one must make a reasonable prognostication as to the debtor's future ability to generate a meaningful income surplus. Hypothetically revesting past-disbursed and -dispersed funds for the sake of a moral condemnation of the dispersion does not get us any further in this inquiry. Neither does grunting about the huge abstract benefit of advanced educational credentials, without considering the realities broad and narrow: the structural limitations of crowded American employment markets for degreed persons in particular fields, or the hobbles that psychological conditions, responsibilities to dependents, or other undeniable day-to-day

to the one he had previously. Absent a significant hike in rate under the Debtor's adjustable-rate mortgage, which could not occur for several years, there was no impact on the Debtor's immediate monthly budget.

impediments may put on the ability to translate the credential into sustained high earnings. ECMC's thought here may have been prophylactic--an attempt to duck an even lower bar, a lower payment amount for a hypothetical restructuring were the Debtor to have proven higher reasonable living expenses than previously stipulated. As it turned out, the effort was not necessary, but it is necessary to now point out: in the end, the argument was facile, snide, and without merit.

A more nagging contrapuntality ran through the application of the evidence to findings on the household budget. In isolation, the findings on the specifics of the budget do not rest with overwhelming ease; so many other portions of the Debtor's testimony suggested a longstanding incidence of robbing Peter to pay Paul, never quite holding currency on debts and expenses, or well-maintaining the family home. Nonetheless, it was the Debtor's burden to prove up a long-term and marked inability to pay--and he had stipulated to virtually all of the line-entries that supported the findings.[13]

One last aspect of ECMC's case that merits comment is the suggestion that the Debtor is not working to exploit his vocational profile so as to maximize his personal income. To the extent this specific consideration is still relevant in the wake of *Andresen* and *Long*,[14] the evidence does not support it.

---

[13] One sees the signs of a slow hemorrhage, leading to the diversion of the proceeds of refinancing to catch up expenditures, but the underlying causes are still obscure. They may lie in a past shortfall only recently addressed by the Debtor's wife taking more of her seasonal employment. With the prospect of further home maintenance going forward, not to be funded by available remaining loan proceeds, it will probably be necessary for the Debtor's wife to work more, to further stabilize the household fisc in light of today's result. That would not be unreasonable; both of the children are old enough to handle themselves if she is out of the household for more time.

[14] *See* discussion *supra* at pp. 15, n. 10, and 18-19.

Yes, the Debtor has two formidable professional credentials on paper. Over the course of two decades, he has made each pay off for him in employment, in turn and in varying degrees of financial benefit. However, ECMC provided no evidence, expert or otherwise, that the Debtor could parlay either of those credentials to any substantially greater income than he earns now. To the contrary, the only possible inferences from the evidence of record are that the Debtor likely has reached a plateau in his earning capacity, for different reasons that are specific to both of his credentials.

In isolation, the Debtor's medical qualifications would probably be the more marketable. However, since his termination from the Allina system, he has not successfully not marketed himself. There may be reasons for that, in the history of his performance in both Minnesota-sited positions. His longer-term prospects for employment as a physician's assistant are completely unknowable from the record.[15]

The Debtor's law degree approaches a decade-old vintage now, with no meaningful experience in the actual practice of law over that stretch. The Debtor was able to turn this aging credential into real employment, through the happenstance of his proximity to a very large legal publisher with substantial needs for law school graduates for its staffing. The match seems to be good, the Debtor's technical skills to his employer's analytical and editorial functions. However, there is no significant likelihood that experience in such theoretically-planed work would substantially enhance the Debtor's employability for the practice of law in the private, governmental, or institutional sectors, and in particular in the more lucrative situs of law firms in private practice.

---

15 The testimony of a professional vocational counselor would be quite helpful on an issue like this. Virtually no party to educational-loan dischargeability proceedings on this Court's docket ever produces such evidence.

As a matter of *possibilities*, the Debtor is not "stuck" where he is; professional's career paths do take unusual and unexpected turns in a dynamic economy like ours. However, there is simply no evidence that a significant jump upwards is in prospect or even likely, in the relevant future. Nor, really, was there any such prospect over the length of the Debtor's employment history. He clearly followed his motivation to become fully employed at the highest level of compensation, given his background of education and experience. The Debtor has been able to make it reasonably well on his hard-won credentials, and he cannot be impugned for not earning more at present.

In the last instance, of course, these observations are not material, because a result is compelled by other facts. Still, they are worth noting--if only to acknowledge the complexities and subtleties of one person's life, and the consequences of choices made during it. They are also a caution against the tone of some of ECMC's arguments, which approached priggishness and parsimony.[16]

---

[16] And there is one last observation to be made, that goes right to the merits: ECMC's relinquishment of any right to claim its "collection costs" against the Debtor is a cornerstone of the result. If the amount its witness bandied about--*nearly one-quarter of the accrued debt*--were added back in and amortized, the increase in the monthly restructured payment would probably dictate an opposite outcome. If ECMC tries to renege on its concession in the future, it may be subject to a grant of relief from today's judgment, on motion of the Debtor. *Cf. In re Andrews*, 661 F.2d at 705 n. 5.

ORDER FOR JUDGMENT

Based upon the foregoing memorandum of decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Excepting the Plaintiff's debt to the Defendant from discharge in BKY 00-50978 would not impose an undue hardship on the Plaintiff and his dependents.

2. Accordingly, the Plaintiff's debt to the Defendant is excepted from discharge in bankruptcy in BKY 00-50978, by operation of 11 U.S.C. §523(a)(8).

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/E/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE