

MAR 30 2007

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	WW-06-1200-MoS Pa
	)		
BRETT MICHAEL CARNDUFF and	)	Bk. No.	05-13455-SJS
JANETH REY CARNDUFF,	)		
	)	Adv. No.	A05-01201-SJS
Debtors.	)		
_____	)		
	)		
BRETT MICHAEL CARNDUFF;	)		
JANETH REY CARNDUFF,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
UNITED STATES DEPARTMENT	)		
OF EDUCATION,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on November 16, 2006  
at Seattle, Washington

Filed - March 30, 2007

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Hon. Samuel J. Steiner, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, SMITH and PAPPAS, Bankruptcy Judges.

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1 MONTALI, Bankruptcy Judge:

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3 The bankruptcy court found that Brett Michael Carnduff  
4 ("Brett") and Janeth Rey Carnduff ("Janeth") ("Debtors") will  
5 never be able to pay their student loan debt of over \$350,000  
6 unless one or both of them "wins the lottery." Nevertheless,  
7 without deciding whether Debtors have made good faith efforts to  
8 repay their loans, the bankruptcy court held that it could not  
9 discharge any of their student loans under Section 523(a)(8)<sup>1</sup>  
10 because their earning capacity should improve in the future. We  
11 REVERSE and REMAND.

12 We publish to emphasize that the bankruptcy court has the  
13 power to grant a partial discharge of student loans even when the  
14 debtor's earning capacity is expected to improve, if that  
15 improvement will be insufficient for the debtor to pay the full  
16 balance due without an undue hardship. However, in that event,  
17 the burden of proof remains with the debtor to establish undue  
18 hardship as to any portion of the debt to be discharged.

19 **I. FACTS AND PARTIES' CONTENTIONS**

20 Each Debtor started off obtaining one degree and later  
21 switched fields and obtained one or more other degrees. Both  
22 attended Andrews University in Michigan, a private school  
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24 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
27 enacted and promulgated prior to the effective date of The  
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"), because the case from  
which this appeal arises was filed before its effective date  
(generally October 17, 2005).

1 ("Andrews"). Brett attended for about eight years and Janeth for  
2 nine, including some part-time enrollment.

3 In 2005, shortly after Brett obtained his last degree,  
4 Debtors filed their joint, voluntary Chapter 7 bankruptcy  
5 petition (Bk. No. 05-13455-SJS) and thereafter filed a "Complaint  
6 to Determine Dischargeability of A Debt (Student Loans)" (Adv.  
7 No. A05-01201-SJS) which named as defendants four private  
8 entities and the United States Department of Education (the  
9 "Government"). A default judgment was entered against all of the  
10 private entities discharging over \$215,000 of Debtors' student  
11 loan debt.

12 Debtors' remaining student loans are owed to the Government.  
13 Brett owed \$190,872.06 and Janeth owed \$168,872.98 as of the date  
14 of trial on January 31, 2006. The bankruptcy court found that  
15 Debtors' combined take-home pay is about \$5,111 per month. It  
16 made no findings as to Debtors' expenses, but the Government  
17 concedes that Brett and Janeth cannot make the payments under  
18 their current ten-year repayment plan, which Debtors calculate at  
19 \$2,138.59 per month for Brett and \$1,889.79 per month for Janeth.

20 The Government argues that Debtors' financial difficulty is  
21 temporary. Debtors are "fresh out of school," have not "even  
22 started repaying the debt," have "25 years of working left, both  
23 of them," and, the Government argues, it "should at least be  
24 given the benefit of looking at their earning capacity for a few  
25 years." Transcript, January 31, 2006, pp. 155:10-12, 157:14,  
26 157:23-24. Debtors testified that their earning capacity is  
27 limited in their chosen fields, that they cannot find more  
28 remunerative work in other fields, and that their financial

1 circumstances will worsen because they have recently divorced and  
2 because for family reasons Brett can no longer move around the  
3 country for contract work and must accept regular employment at  
4 lower pay. The Government responded at trial that Debtors are  
5 not presently maximizing their income, that their income will  
6 increase in the future, and that meanwhile Debtors can use  
7 deferments or forbearances and can make payments consistent with  
8 their financial circumstances under an income contingent  
9 repayment plan ("ICRP"). The Government's interrogatory  
10 responses, admitted at trial, describe plans with monthly  
11 payments ranging from \$823.03 to \$2,141.66 depending on  
12 assumptions about Debtors' future income, interest rates, and  
13 repayment periods which can range from the current 10 years up to  
14 25 or 30 years. Debtors do not dispute that they may qualify for  
15 an ICRP or other repayment plan but their attorney argued that  
16 they cannot afford even \$200 per month. He also argued that,  
17 although Debtors might be eligible for debt forgiveness at the  
18 end of an ICRP or other plan, that would result in "a huge tax  
19 bite." Transcript, January 31, 2006, p. 149:17-21.

20 Brett is healthy and was 34 years old as of the date of  
21 trial. He has a bachelor's degree in technology in computer  
22 imaging with an emphasis in business and communications. Brett  
23 testified that he has not been able to get a job using that  
24 degree because his degree was awarded in 1997 and the relevant  
25 software programs are now completely different.

26 In addition, Brett holds a master's degree in developmental  
27 and educational psychology with an emphasis on school psychology.  
28 He intended to obtain a Ph.D. in that field but testified that as

1 a result of a loan consolidation program he lost funding to  
2 complete his Ph.D. Instead he obtained an Educational Specialist  
3 Degree which he describes as between a master's and a Ph.D.  
4 Brett testified that because he does not have a Ph.D. he is not  
5 qualified for any work other than being a school psychologist  
6 except for teaching at a community college which would pay "much  
7 less" than his current employment. As of the date of trial he  
8 was earning a salary of somewhere between \$45,000 and \$50,000 per  
9 year.

10 Brett does not expect his future pay to increase by much.  
11 According to the pay scale set by the State of Washington, Brett  
12 testified, "I'm looking at \$58,000 after 20 years of experience."  
13 Transcript, January 31, 2006, p. 37:24-25. He added that  
14 Washington is "one of the highest paying states in the United  
15 States for my job." Id. p. 89:14-15.

16 Janeth is healthy and was 36 years old as of the date of  
17 trial. She has a bachelor of science degree with a major in  
18 medical technology but testified that she cannot be employed in  
19 that field because she never passed the test for certification as  
20 a medical technologist. She could have taken the test a third  
21 time within two years after graduation. If she failed again,  
22 though, she would have had to go back to school for about one and  
23 a half years. Even if she had passed the test she testified that  
24 she would only have earned \$16 per hour as a medical  
25 technologist, which is less than what she makes now as an  
26 administrative assistant. Transcript, January 31, 2006,  
27 pp. 115:23-116:3, 119:9-120:14, 125:25-126:8. Instead of taking  
28 the test again Janeth stayed home with Debtors' two children for

1 three years without a paying job and then went back to graduate  
2 school on a part-time basis for four years.

3 Janeth earned a master's degree in social work with an  
4 emphasis in community service. She testified, "I don't have an  
5 internship, so that's why I can't get a job right now."  
6 Transcript, January 31, 2006, p. 117:11-12. "[N]obody will hire  
7 me, because you need at least five years of experience" and "I  
8 don't have any . . . not even [an] internship." Id. p. 128:1-7.

9 Janeth is presently employed as an administrative assistant  
10 earning \$16.49 per hour. She works four days a week, typically  
11 for 32 hours, and takes Fridays off for religious reasons. She  
12 has the option to work for ten hours on the four days that she  
13 works but she chooses not to do so, both so that she can spend  
14 more time with her children and because the added child care  
15 expenses of working longer hours would exceed her added income.  
16 Transcript, January 31, 2006, pp. 109:5-110:15, 131:2-7, 136:10-  
17 20.

18 Janeth testified that she is unable to "move up" at work and  
19 that she is not qualified to be an administrator because without  
20 an MBA degree she is only qualified to "work for a non-profit,  
21 like Red Cross Community Service." Transcript, January 31, 2006,  
22 pp. 116:6-17, 127:14-18. At a non-profit she "can do grant  
23 writing, and it will be \$3 less [per hour] than what I'm making  
24 now." Id. p. 118:9-12. In 2005 she did some house cleaning for  
25 her sister to make some extra money. She has sent out about ten  
26 resumes to employers without having received any job offers.

27 Debtors have been divorced from each other once before and  
28 they divorced again after filing their bankruptcy petition. As

1 of the date of trial they were living together but the bankruptcy  
2 court assumed that they would live separately at some point and  
3 that this will increase their expenses.

4 The Government did not put on any witnesses but argued that  
5 some expenses, such as the children's private school and tithing  
6 to their church, are self-imposed and that Debtors are really  
7 just choosing to spend all of their take home pay. The  
8 Government added that Debtors had chosen to stay in college for  
9 eight years at a private institution with very high tuition and  
10 had then chosen to pay private lenders rather than the Government  
11 because Brett's mother had co-signed many of those loans. The  
12 Government's attorney also argued:

13 I know that the plaintiff's counsel has said, well, the  
14 Government hasn't shown [that Debtors] will be making,  
15 you know, huge salaries. It's not the Government's  
16 burden. It's the plaintiff's burden to show that there  
17 is some barrier on their path to recovery that's more  
18 than just a current inability to make the payments. It  
19 appears that they have a current inability to make the  
20 payments. But they haven't shown anything that's going  
21 to make that persist for 25 years.

22 Transcript, January 31, 2006, p. 158:1-10.

23 Debtors' attorney focused, both in his trial brief and in  
24 oral argument at trial, on obtaining a complete discharge of  
25 Debtors' student loans but in the alternative he sought a partial  
26 discharge. At the end of trial the bankruptcy court asked the  
27 Government's counsel, "What about the idea of a partial  
28 discharge?" She responded:

29 I'm aware that the Court can do it. I would ask  
30 that the Court not entertain that idea now, simply  
31 because the Government should be given the benefit of  
32 seeing at least some earning capacity. Right now we  
33 have nothing. We are just supposed to take it on their  
34 word that they're not going to be able to make much  
35 more. But they just started. So if we get to a point

1 where they've shown that they've tried and that they  
2 can't do it, even given all the, you know, leniencies  
3 the [D]epartment [of Education] is willing to do, then  
4 I'd say it's something to consider for the Court. But  
5 we'd ask that you not consider it now, given the timing  
6 and how new this is.

7 Transcript, January 31, 2006, pp. 158:13-159:2.

8 The bankruptcy court announced its ruling orally at a  
9 hearing on March 16, 2006. It concluded that Debtors could never  
10 repay the full amount of their student loan debt to the  
11 Government but that they are not entitled to a full or partial  
12 discharge of the debt because, based on the bankruptcy court's  
13 own experience, their earning capacity should improve in the  
14 future. Transcript, March 16, 2006, pp. 6:16-8:1.

15 On May 19, 2006, the bankruptcy court entered a judgment  
16 that the entire amounts of Debtors' student loan obligations to  
17 the Government are not dischargeable in bankruptcy. Debtors  
18 filed a timely notice of appeal.

## 19 **II. ISSUE**

20 Are Debtors entitled to a full or partial discharge of their  
21 student loan debt to the Government?<sup>2</sup>

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22 <sup>2</sup> Despite their separate outstanding student loans, we  
23 treat Debtors as a single unit, even though they have divorced,  
24 because they were living together at the time of trial. Further,  
25 the bankruptcy court considered at least their current income and  
26 expenses together, and the parties have not argued on appeal that  
27 this was error. We express no opinion whether the bankruptcy  
28 court should treat Debtors separately or together, should do so  
only for some purposes or for all purposes, or should consider  
any post-trial changes in Debtors' living arrangements or other  
circumstances. Those issues can be addressed on remand as  
appropriate.



1 **III. STANDARDS OF REVIEW**

2 "We review de novo the bankruptcy court's application of the  
3 legal standard in determining whether a student loan debt is  
4 dischargeable as an undue hardship." In re Rifino, 245 F.3d  
5 1083, 1087 (9th Cir. 2001) (citation omitted). We review the  
6 bankruptcy court's findings of fact for clear error. In re Pena,  
7 155 F.3d 1108, 1110 (9th Cir. 1998).

8 **IV. DISCUSSION**

9 Section 523(a) (8) provides in full:

10 § 523. Exceptions to discharge

11 (a) A discharge under section 727, 1141, 1228(a),  
12 1228(b), or 1328(b) of this title does not discharge an  
individual debtor from any debt --

13 \* \* \*

14 (8) for an educational benefit overpayment or loan  
15 made, insured or guaranteed by a governmental  
16 unit, or made under any program funded in whole or  
17 in part by a governmental unit or nonprofit  
18 institution, or for an obligation to repay funds  
received as an educational benefit, scholarship or  
stipend, unless excepting such debt from discharge  
under this paragraph will impose an undue hardship  
on the debtor and the debtor's dependents[.]

19 11 U.S.C. § 523(a) (8) (emphasis added).

20 Neither the Bankruptcy Code nor the legislative history of  
21 Section 523(a) (8) defines "undue hardship."<sup>3</sup> Case law has held  
22

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23 <sup>3</sup> Paragraph (8) of Section 523(a) has been amended by  
24 BAPCPA. As stated in footnote 1 above that amendment does not  
25 apply to this case, but we note that Congress has not included  
any definition of "undue hardship" in the amended statute:

26 (a) A discharge under section 727, 1141, 1228(a),  
27 1228(b), or 1328(b) of this title does not discharge an  
individual debtor from any debt --

28 (continued...)

1 that it is something more than "garden-variety hardship." Pena,  
2 155 F.3d at 1111 (citation omitted). The Ninth Circuit has  
3 adopted the three-prong test of Brunner v. N.Y. State Higher  
4 Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987):

5 First, the debtor must establish "that she cannot  
6 maintain, based on current income and expenses, a  
7 'minimal' standard of living for herself and her  
8 dependents if forced to repay the loans." Brunner, 831  
9 F.2d at 396. . . .

10 Second, the debtor must show "that additional  
11 circumstances exist indicating that this state of  
12 affairs is likely to persist for a significant portion  
13 of the repayment period of the student loans."  
14 Brunner, 831 F.2d at 396. This second prong is  
15 intended to effect "the clear congressional intent  
16 exhibited in section 523(a)(8) to make the discharge of  
17 student loans more difficult than that of other  
18 nonexcepted debt." Id.

19 The third prong requires "that the debtor has made  
20 good faith efforts to repay the loans. . . ." Brunner,  
21 831 F.2d at 396. The "good faith" requirement fulfills  
22 the purpose behind the adoption of section 523(a)(8). .

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23 <sup>3</sup>(...continued)  
24 \* \* \*

25 (8) unless excepting such debt from discharge under  
26 this paragraph would impose an undue hardship on the  
27 debtor and the debtor's dependents, for --

28 (A) (i) an educational benefit overpayment or loan made,  
insured, or guaranteed by a governmental unit, or made  
under any program funded in whole or in part by a  
governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an  
educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified  
education loan, as defined in section 221(d)(1) of the  
Internal Revenue Code of 1986, incurred by a debtor who  
is an individual[.]

11 U.S.C. § 523(a)(8) (as amended by BAPCPA).

1 . . . Section 523(a)(8) was a response to "a 'rising  
2 incidence of consumer bankruptcies of former students  
3 motivated primarily to avoid payment of education loan  
4 debts.'" Id. . . . This section was intended to  
5 "forestall students . . . from abusing the bankruptcy  
6 system." Id.

7 Pena, 155 F.3d at 1111 (some citations omitted).

8 The debtor has the burden to prove all three prongs of the  
9 Brunner test. If the debtor fails to prove any one of the three  
10 prongs then the loan will not be discharged. In re Nys, 308 B.R.  
11 436, 441-42 (9th Cir. BAP 2004), aff'd, 446 F.3d 938 (9th Cir.  
12 2006).

13 In measuring income and expenses the test is whether it  
14 would be "'unconscionable' to require the debtor to take steps to  
15 earn more income or reduce her expenses" in order to make  
16 payments under a given repayment schedule. In re Birrane, 287  
17 B.R. 490, 495 (9th Cir. BAP 2002) (quoting In re Nascimento, 241  
18 B.R. 440, 445 (9th Cir. BAP 1999)).

19 A partial discharge of student loan debt is also  
20 permissible. In re Saxman, 325 F.3d 1168 (9th Cir. 2003).  
21 Either the debtor or the lender may seek a partial discharge.  
22 Typically the debtor presents evidence of current income and  
23 expenses and any other relevant facts under Brunner and the  
24 lender presents any contrary evidence. The bankruptcy court then  
25 determines, based on the parties' evidence, whether the debtor  
26 can afford to pay all, part, or none of the student loan debt  
27 without undue hardship. Id. at 1173-75. The case before us is  
28 somewhat different because the bankruptcy court drew from its own  
experience. Also, although it was persuaded that Debtors could  
never repay the loan in full, it found that Debtors' earning

1 capacity should improve in the future and then it apparently  
2 concluded that it had no power to grant a partial discharge.  
3 Before considering Saxman and the possibility of a partial  
4 discharge, we turn to the Brunner factors.

5 A. The first prong of Brunner

6 Debtors have the burden to prove that they “cannot maintain,  
7 based on current income and expenses, a ‘minimal’ standard of  
8 living for [themselves] and [their] dependents if forced to repay  
9 the loans.” Brunner, 831 F.2d at 396 (emphasis added). Debtors  
10 argue that they cannot presently afford any payments at all. The  
11 Government challenges some expenses. Debtors defend those  
12 expenses and claim that the bankruptcy court miscalculated their  
13 income.

14 We need not resolve these disputes. Even with every  
15 adjustment in the Government’s favor there would be only a few  
16 hundred dollars left over every month after deducting Debtors’  
17 current expenses from their current income. The evidence does  
18 not show that such a modest increase in Debtors’ income would be  
19 adequate to fully amortize the entire amount of their student  
20 loan debt.

21 B. The second prong of Brunner

22 This prong, which examines future finances, has generated  
23 some confusion. Its purpose, according to the Second Circuit in  
24 Brunner, is to test whether the hardship presented is truly  
25 “undue.” Brunner, 831 F.2d at 396. Therefore, in addition to a  
26 current inability to repay the debt, the debtor must show  
27 “exceptional” circumstances “strongly suggestive of continuing  
28 inability to repay over an extended period of time.” Id. The

1 word "exceptional" led at least one court to believe that there  
2 must be evidence of a serious illness, psychiatric problems,  
3 disability of a dependent, or similar circumstances, and not just  
4 an inability to repay. See Nys, 308 B.R. at 440 (quoting  
5 bankruptcy court's holding). We and the Ninth Circuit have  
6 clarified that the circumstances need be exceptional only in the  
7 sense that they demonstrate insurmountable barriers to the  
8 debtor's financial recovery and ability to repay the student loan  
9 now and for a substantial portion of the loan's repayment period.  
10 Id. at 444, aff'd, 446 F.3d at 941.

11 Another confusing aspect of the second prong is the standard  
12 of proof required. The district court in Brunner required a  
13 "certainty of hopelessness, not simply a present inability to  
14 fulfill financial commitment." In re Brunner, 46 B.R. 752, 755  
15 (S.D.N.Y. 1985) (emphasis added, citation omitted), aff'd, 831  
16 F.2d 395. We have used the same language. Nys, 308 B.R. at 443.  
17 Even though this language could be interpreted to require  
18 absolute certainty that a debtor's financial situation will not  
19 improve, this is not so. Rather, only a preponderance of the  
20 evidence standard applies. What must be certain is the  
21 hopelessness -- the expectation that the debtor will be unable to  
22 repay the student loans -- but predicting future finances is  
23 "problematic" and the projected dollar amounts could never be  
24 certain. Brunner, 831 F.2d at 396. Thus in Nys we equated the  
25 "certainty of hopelessness" language with the test that the  
26 Second Circuit actually adopted in Brunner and which we have  
27 quoted above: "exceptional circumstances, strongly suggestive of  
28 continuing inability to repay over an extended period of time."

1 Nys, 308 B.R. at 443 (quoting Brunner, 831 F.2d at 396) (emphasis  
2 added). In Nys we also quoted with approval a leading  
3 commentator describing the standard as "preponderance of the  
4 evidence" and noting that the debtor is not required to prove his  
5 or her case "with certainty." Nys, 308 B.R. at 442-43 (quoting  
6 4 Collier on Bankruptcy ¶ 523.14[2], at 523-100 (Alan R. Resnick  
7 and Henry J. Sommer eds., 15th ed. rev. 2003)).<sup>4</sup>

8 Applying the above standards, Brunner's second prong sets a  
9 high but not impossible bar. To discharge any of their student  
10 loan debt to the Government, Debtors must prove by a  
11 preponderance of the evidence that, for a substantial portion of  
12 the loan repayment period, they would not be able to maintain  
13 even a "minimal" standard of living if forced to pay that debt.

14 In this case the bankruptcy court held that Debtors did not  
15 meet their burden to prove Brunner's second prong:

16 As to the second Brunner test, that is, in effect,  
17 whether the dire financial circumstances will continue  
18 throughout the repayment period of the loan, this is  
19 obviously the main issue of the case. The Government  
20 points [out] that both debtors are in their early 30's;  
they are healthy and well educated; their financially  
productive years are ahead of them; that there is no  
reason for the two of them to be forever stuck in a

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21 <sup>4</sup> The prediction of future finances is not set in stone.  
22 Nondischargeability under Section 523(a)(8) has been held not to  
23 be preclusive in a later bankruptcy case. See In re Nash, 446  
24 F.3d 188, 194 (1st Cir. 2006); 11 U.S.C. § 523(b)  
25 ("Notwithstanding subsection (a) of this section, a debt that was  
26 excepted from discharge under subsection . . . (a)(8) of this  
27 section . . . in a prior case concerning the debtor under this  
28 title . . . is dischargeable in a case under this title unless,  
by the terms of subsection (a) of this section, such debt is not  
dischargeable in the case under this title."). See also In re  
Fuller, 296 B.R. 813, 819 (Bankr. N.D. Cal. 2003) (decision  
explicitly without prejudice because of possibility of future  
changes in circumstances).

1 financial backwater; and that their earning capacity  
2 should improve in the future, particularly if they make  
the effort.

3 On this issue, in large part, I agree with the  
4 Government. I get the impression that these debtors  
5 are resigned to their present circumstances. I see no  
6 reason why they should be. As has been pointed out,  
7 they are young, they are healthy, they are well  
8 educated, and there is no reason why their financial  
9 circumstances should not improve, particularly when  
10 their children become of age, and provided they make  
the effort.

11 Accordingly, I conclude that the debtors have not  
12 satisfied the second prong of Brunner and that the  
13 student loans are not dischargeable.

14 Transcript, March 16, 2006, pp. 6:16-7:13 (emphasis added).

15 Debtors argue persuasively that the bankruptcy court applied  
16 an incorrect legal test. The issue is not whether Debtors'  
17 financial circumstances are likely to improve at all but whether  
18 Debtors can rebut the presumption that their income "will  
19 increase to a point where [they] can make payments and maintain a  
20 minimal standard of living." Nys, 446 F.3d at 946 (emphasis  
21 added). We interpret "payments" to mean the payments that would  
22 be required if the student loan debt at issue is not discharged.  
23 This is consistent with Ninth Circuit direction: "Undue hardship  
24 requires only a showing that the debtor will not be able to  
25 maintain a minimal standard of living now and in the future if  
26 forced to repay her student loans." Id. at 946 (emphasis added).

27 The bankruptcy court itself found that there is no way that  
28 Debtors can pay their student loan debts in full. After stating  
that Debtors' earning capacity and financial circumstances should  
improve in the future it stated:

Now, having said all that, as a practical matter,  
it appears to me that unless one or both of these  
debtors wins the lottery, receives a substantial

1 inheritance, finds a gold mine or a treasure trove in  
2 the backyard or somehow achieves wealth in some other  
3 way, that there is simply no way in which these loans  
will ever be repaid in full.

4 Transcript, March 16, 2006, pp. 7:16-7:22.

5 Therefore, Debtors have shown that their future income and  
6 expenses will not permit them to pay their entire student loan  
7 debt without undue hardship.

8 C. The third prong of Brunner

9 As stated at the beginning of this opinion the bankruptcy  
10 court did not find whether Debtors have made good faith efforts  
11 to repay their loans. The bankruptcy court treated Debtors'  
12 obligations to the Government as nondischargeable regardless of  
13 whether they could prove good faith.

14 Debtors imply that we should go further and decide the good  
15 faith issue, but we cannot engage in factfinding. That is for  
16 the bankruptcy court on remand. See generally In re Dolph, 215  
17 B.R. 832, 837-38 (6th Cir. BAP 1998) (remanding for Brunner  
18 analysis when factual findings were ambiguous). Cf. In re Mason,  
19 464 F.3d 878 (9th Cir. 2006) (reversing good faith determination  
20 based on subsidiary facts found by bankruptcy court).

21 D. Partial discharge

22 This case seems to cry out for a partial discharge. Debtors  
23 owe the Government over \$350,000 and from Debtors' evidence the  
24 bankruptcy court found that there is "no way in which these loans  
25 will ever be repaid in full." Transcript, March 16, 2006,  
26 pp. 6:16-7:22. By definition, then, forcing them to try paying  
27 over \$350,000 would seem to be an undue hardship (assuming  
28 Debtors' good faith, for purposes of discussion only). On the



1 other hand, the bankruptcy court found that Debtors' finances  
2 "should improve in the future," id., which implies that it  
3 thought Debtors will be able eventually to pay some meaningful  
4 portion of their student loan debt. If so, then Debtors might be  
5 unjustly rewarded and the Government unjustly punished if the  
6 entire student loan debt were to be discharged simply because it  
7 is so large that Debtors cannot pay it in full. The middle  
8 ground is a partial discharge.

9 The bankruptcy court nevertheless believed that it was  
10 prohibited from granting a partial discharge in this case:

11 I seriously considered granting a partial discharge.  
12 However, as I said from the start, in In re Pena, which  
13 adopts Brunner, that is the law in this circuit, and I  
14 am bound to follow it.

15 Transcript, March 16, 2006, pp. 7:22-8:1.

16 We do not interpret Pena and Brunner as prohibiting a  
17 partial discharge in this case. The Ninth Circuit has rejected  
18 the view that Section 523(a)(8) mandates an "all-or-nothing"  
19 approach to nondischargeability of student loan debt. Saxman,  
20 325 F.3d at 1173. One problem with the all-or-nothing approach  
21 is that it renders a "large debt more likely of discharge"  
22 thereby rewarding "irresponsible borrowing" and conversely  
23 punishing debtors who either borrow less or pay down their  
24 student loans before filing their bankruptcy petition. In re  
25 Myrvang, 232 F.3d 1116, 1123 (9th Cir. 2000) (discussing Section  
26 523(a)(15) and quoting In re Brown, 239 B.R. 204, 211) (S.D. Cal.  
27 1999)); Saxman, 325 F.3d at 1174 (applying Myrvang reasoning to  
28 Section 523(a)(8)).

Saxman held that bankruptcy courts have the equitable power

1 to grant a partial discharge. 325 F.3d at 1173-75. We do not  
2 interpret Saxman to mean that bankruptcy courts are required in  
3 every instance to consider a partial discharge, but they have the  
4 discretion to do so. See In re Stewart-Johnson, 319 B.R. 192,  
5 198 (Bankr. D. Ariz. 2005). Contra In re Bossardet, 336 B.R.  
6 451, 457 (Bankr. D. Ariz. 2005). The bankruptcy court in this  
7 case thought that it lacked such discretion, which is an error of  
8 law.

9 Saxman required that all three prongs of Brunner be  
10 satisfied in partial discharge cases, as a curb on unbounded  
11 equitable powers. The Ninth Circuit rejected authority that  
12 "even if a debtor fails to establish his or her burden under  
13 § 523(a)(8) of showing undue hardship, bankruptcy courts can  
14 still partially discharge educational loans pursuant to  
15 § 105(a)." Saxman, 325 F.3d at 1174 (citing In re Hornsby, 144  
16 F.3d 433, 439 (6th Cir. 1998)). The problem with permitting a  
17 partial discharge "without first finding that the Brunner test  
18 has been satisfied is that the equitably-based principle of  
19 partial discharge would then have the very real potential to  
20 eviscerate the statutorily-based undue hardship provision."  
21 Saxman, 325 F.3d at 1174. The court concluded:

22 A debtor who wishes to obtain a discharge of his  
23 student loans must therefore meet the requirements of  
24 § 523(a)(8) as to the portion of the debt to be  
discharged before that portion of his or her debt can  
be discharged.

25 Saxman, 325 F.3d at 1174 (emphasis added).

26 1. Burden of proof

27 As we read the emphasized language just quoted, the burden  
28 of proof remains with the student loan debtor in partial

1 discharge cases. It is the debtor's burden to establish the  
2 portion of the debt to be discharged -- "the portion that results  
3 in undue hardship." Id. at 1175 (quoting lower court).

4 Undue hardship is tested by the three prongs of Brunner,  
5 regardless whether at the end of trial the bankruptcy court is  
6 considering a full or a partial discharge. On the first prong  
7 the debtor presents evidence of "current income and expenses" and  
8 the bankruptcy court determines whether, consistent with a  
9 "minimal" standard of living, the debtor currently can pay some,  
10 all, or none of the student loan debt. Pena, 155 F.3d at 1111  
11 (quoting Brunner, 831 F.2d at 396). On the second prong the  
12 debtor presents evidence of additional circumstances indicating  
13 that "this state of affairs is likely to persist for a  
14 significant portion of the repayment period of the student  
15 loans." Id. Finally, the debtor presents evidence of "good  
16 faith efforts to repay the loans." Id. If the debtor does not  
17 make a prima facie showing of these things, or if the lender  
18 rebuts that showing, then the debtor is not entitled to even a  
19 partial discharge.

20 There is some contrary authority. Stewart-Johnson holds  
21 that burden of proof shifts to the creditor when partial  
22 discharge is at issue:

23 At most, Saxman and the procedural reforms of the  
24 Bankruptcy Code [which generally removed judges from  
25 administrative functions and limited them to resolving  
26 disputes] mean that if a creditor seeks a partial  
27 discharge, it should take a position asserting exactly  
28 what amount of debt it contends would not pose an undue  
hardship . . . . The court would then merely need to  
determine whether the creditor has carried the burden  
of proof that that amount of debt does not impose an  
undue hardship.

1 Stewart-Johnson, 319 B.R. at 199 (footnote omitted). See also  
2 Bossardet, 336 B.R. at 457 (agreeing with Stewart-Johnson on  
3 shifting burden of proof).

4 We disagree. Stewart-Johnson does not distinguish the  
5 language that we have quoted from Saxman, which we interpret as  
6 placing the ultimate burden of proof squarely on the debtor.  
7 Shifting the burden of proof would also cause the very problem  
8 that Saxman sought to avoid. It would reward debtors with larger  
9 student loan debts. Debtors in this case were able to prove that  
10 they could never pay their full debt because it is so large  
11 -- over \$350,000 -- so they would have the benefit of shifting  
12 the burden of proof whereas a debtor who borrowed less would not  
13 have that benefit.

14 We are mindful of, but not persuaded by, the countervailing  
15 problems that Stewart-Johnson sought to avoid:

16 It is one thing for a Court to determine that payment  
17 of a certain amount of debt would or would not impose  
18 an undue hardship. It is entirely another matter to  
19 ask the Court to establish exactly how much debt could  
20 be paid without creating an undue hardship. This would  
21 put the Court into the position of micro-managing the  
22 debtor's lifestyle, determining precisely the amount  
23 that should be spent each month on variables such as  
24 food, clothing, cable television, recreation,  
25 subscriptions, retirement savings and grooming.  
26 Indeed, the Court could even become involved in  
27 adjusting what might normally be considered fixed  
28 expenses, such as by requiring the debtor to move to a  
less expensive home . . . .

Such determinations would impose on the court a  
much more intrusive role than the court necessarily  
plays in resolving disposable income disputes for  
purposes of § 1325(b). Such disposable income  
determinations are usually made only when the Chapter  
13 trustee objects . . . . Chapter 13 trustees have far  
more experience with family lifestyle spending  
decisions than do bankruptcy judges . . . .  
[B]ankruptcy courts should not supplant the trustees'  
business judgments, but rather merely should determine

1 whether the trustee has exercised appropriate business  
2 judgment. Yet if bankruptcy courts were required to  
3 determine how much of a partial discharge should be  
4 granted, they have to exercise a kind of family  
5 business judgment in an adversary context without even  
6 the recommendation of a neutral third party such as a  
7 trustee. Such a role would be contrary to one of the  
8 principal reforms accomplished by the Bankruptcy Code,  
9 which was to remove bankruptcy judges from  
10 administrative functions and limit them to the proper  
11 judicial role of resolving disputes.

12 Stewart-Johnson, 319 B.R. at 198-99 (footnotes omitted).

13 Although these are legitimate concerns, the bankruptcy court  
14 faces the same potential problem of micro-management regardless  
15 who has the burden of proof. Congress has not defined "undue  
16 hardship" so the courts must determine how much hardship is  
17 undue. Perhaps the bankruptcy court can obtain guidance from the  
18 disposable income test of Chapter 13 (11 U.S.C. § 1325(b)),<sup>5</sup> the  
19 provisions of BAPCPA regarding bankruptcy "abuse" (e.g., 11  
20 U.S.C. § 707(b)), or expert testimony, but one way or another it  
21 must decide the issue that Congress created.

22 Another reason advanced by Stewart-Johnson for shifting the  
23 burden of proof is based on its reading of Section 523(a)(8):

24 Because the partial discharge is in effect a  
25 case-law exception to the undue hardship provision of

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26 <sup>5</sup> We express no view whether the disposable income test of  
27 Chapter 13 is either a permissible or a required method of  
28 assessing undue hardship under Section 523(a)(8). Compare In re  
Sequeira, 278 B.R. 861, 865 (Bankr. D. Or. 2001) ("There is no  
reason to believe that Congress intended a harsher standard in  
discharge analysis" than what is required "to determine  
'disposable income' in Chapter 13 cases") with In re Fulbright,  
319 B.R. 650, 657-58 (Bankr. D. Mont. 2005) ("Under § 1325, a  
debtor is generally not required to alter reasonable lifestyle  
choices" whereas "[u]nder § 523(a)(8), . . . deference to a  
debtor's lifestyle choices is, to put it kindly, muted.")  
(quoting In re Savage, 311 B.R. 835, 840 n.7 (1st Cir. BAP  
2004)).

1 Code § 523(a) (8) (which is already an exception to an  
2 exception), it seems appropriate that the burden of  
3 proof should be placed on the party who seeks to  
4 demonstrate an exception from statutory language.

5 Stewart-Johnson, 319 B.R. at 199 n.12.

6 We disagree with the premise that Section 523(a) (8) favors  
7 an all-or-nothing approach and that a partial discharge is  
8 therefore an "exception" to the statutory language. As we  
9 interpret Saxman, it held the opposite. It held that "such debt"  
10 in Section 523(a) (8) should not be "interpreted as evincing a  
11 congressional intent that student debt either be completely  
12 discharged or not at all." 325 F.3d at 1173. It also held that  
13 even if "such debt" refers to the entire student loan debt,  
14 Section 523(a) (8) is still "silent with respect to whether the  
15 bankruptcy court may partially discharge the loan." Id. A  
16 partial discharge is not an exception to the statute. To the  
17 contrary, an all-or-nothing treatment "thwarts the purpose of the  
18 Bankruptcy Act." Id. at 1174 (quoting Hornsby, 144 F.3d at 439).

19 Section 523(a) (8) places the burden on debtors to prove that  
20 they cannot pay all of their student loan debt, or at least some  
21 portion of it, without undue hardship. Debtors have the burden  
22 to prove all three prongs of Brunner "as to the portion of the  
23 debt to be discharged." Saxman, 325 F.3d at 1174 (emphasis  
24 added).

## 25 2. Application of the burden of proof in this case

26 Debtors attempted to show that they could not pay any of  
27 their student loan debt without undue hardship. They argued in  
28 the alternative that they could pay only part of their student  
loan debt. Brett testified that he would earn no more than

1 \$58,000 after 20 years of experience as a school psychologist and  
2 Janeth testified that for various reasons her degrees in medical  
3 technology and social work would not generate income above her  
4 current earnings. The bankruptcy court appears to have accepted  
5 that Debtors' income potential is limited within their chosen  
6 fields, at least for the sake of argument. See Transcript,  
7 January 31, 2006, p. 153:17-19. If the bankruptcy court had no  
8 other concerns then it might have used Debtors' evidence to  
9 project their future income, deduct future expenses, calculate  
10 how much student loan debt Debtors could pay without undue  
11 hardship, and discharge the excess. That is not what happened.  
12 The bankruptcy court asked Debtors' counsel:

13           What I want to know from you is this. Both  
14           [Debtors] seem to think their only employment  
15           opportunities are in the field for which they have this  
16           extensive education. Why couldn't they look for  
17           employment with a better future in other fields? I  
18           mean, let's say Boeing starts hiring. Maybe you could  
19           get a good job at Boeing. Let's say that there might  
20           be an opening at Microsoft. Aren't they limiting  
21           themselves just by saying, well, I'm just trained as a  
22           school psychologist, so that's all I'm ever going to  
23           do?

19 Transcript, January 31, 2006, pp. 137:17-138:2.

20           The bankruptcy court later gave an example of someone who  
21           went to work "years ago" for Boeing "in the most menial job they  
22           had there" and worked his way up to end up making "80, \$85,000 a  
23           year." Id. p. 143:14-22. Debtors essentially argue that this is  
24           speculation. We interpret it differently: the bankruptcy court  
25           was using an example to illustrate that it did not believe that  
26           Debtors' future earning capacity was as limited as they claimed.

27           Debtors argue that the bankruptcy court was required to make  
28           actual projections in specific dollar amounts. We disagree.

1 Debtors have the burden to show the portion of their student loan  
2 debt that they will be unable to pay without undue hardship. The  
3 bankruptcy court does not have the burden to show the opposite,  
4 let alone calculate precise dollar amounts. Debtors did attempt  
5 to meet their burden of proof but the bankruptcy court was  
6 entitled to disbelieve their evidence. See Anderson v. City of  
7 Bessemer City, N.C., 470 U.S. 564, 574 (1985) ("Where there are  
8 two permissible views of the evidence, the factfinder's choice  
9 between them cannot be clearly erroneous.").

10 We could interpret the bankruptcy court's refusal to grant a  
11 partial discharge as an implicit ruling that Debtors did not meet  
12 their burden of proof. If Debtors did not meet their burden to  
13 prove how much their student loan debt should be reduced then, it  
14 seems to us, they are not entitled to a partial discharge. The  
15 bankruptcy court would be left with only an all-or-nothing  
16 choice. Because discharging the entire debt would be inequitable  
17 to the Government, perhaps the only alternative was to discharge  
18 none of the debt. Cf. Hornsby, 144 F.3d at 440 (noting various  
19 alternative approaches to partial discharge). Admittedly Debtors  
20 would be left owing more than they could ever pay, but that  
21 sometimes happens in nondischargeability cases.

22 But we will not affirm on this basis. The bankruptcy court  
23 appears to have made its decision not because of the burden of  
24 proof but because it thought it had no discretion to consider a  
25 partial discharge, which is an error of law. We cannot defer to  
26 the exercise of discretion that the bankruptcy court seems to  
27 have believed it did not have.

28 We are also concerned that the way in which the bankruptcy



1 court drew on its own experience and rejected Debtors' contrary  
2 evidence may not have given Debtors a fair opportunity to rebut  
3 its concerns about alternative employment. The bankruptcy court  
4 first expressed its concerns after the close of evidence. The  
5 Government offered no evidence or even specific examples of  
6 alternative employment, although in closing argument its attorney  
7 did state, "as the Court pointed out, there are so many other  
8 things that these plaintiffs can do." Transcript, January 31,  
9 2006, p. 154:21-22. The bankruptcy court also may have  
10 overlooked some evidence. It stated, "I don't have any evidence  
11 [that Debtors] ever tried anything out of their fields." Id.,  
12 pp. 137:17-138:2, 144:9-11. Debtors' counsel pointed out that  
13 Brett testified to having done some work in sales. Id. at pp.  
14 94:18-23, 144:12-13. The bankruptcy court acknowledged, "[y]eah,  
15 he did." Id. at p. 144:14. Debtors' counsel then added, "when  
16 you look at the evidence, they're earning what they can, the  
17 highest that they can." Id. at p. 144:21-22 et seq. This is an  
18 accurate summary of the only relevant evidence before the  
19 bankruptcy court -- Debtors' testimony. Debtors testified that  
20 their earlier degrees were outmoded (Brett's computer imaging  
21 degree) or useless (Janeth's lack of certification as a medical  
22 technologist), that alternative employment related to their  
23 degrees would actually pay less than they presently earn  
24 (teaching at community college for Brett and working as a grant  
25 writer or medical technologist for Janeth), that they could not  
26 earn more in alternate fields, and that in order to qualify for  
27 higher paying jobs they would have to return to school and incur  
28 more student loan debt, which they cannot afford. See, e.g.,

1 Transcript, January 31, 2006, pp. 44:17-23, 94:12-97:10, 122:5-8,  
2 144:9-24. Debtors' counsel alluded to this evidence in response  
3 to the bankruptcy court's questions. Id., pp. 138:12-139:9,  
4 142:19-143:5, 144:12-24. See generally Pena, 155 F.3d at 1110,  
5 1114 (when debtor's educational credential was "useless to him,"  
6 bankruptcy court did not err in considering that his income was  
7 unlikely to increase as a result of his education); Nys, 446 F.3d  
8 at 946 & n.7 (debtor must "present the court with circumstances  
9 that she cannot reasonably change" but "[a]t the same time, we  
10 cannot fault the debtor for having made reasonable choices that  
11 now inhibit her ability to substantially increase her income in  
12 the future").

13 We recognize that Debtors' counsel could have asked the  
14 bankruptcy court to reopen the trial and reopen discovery so that  
15 he could find an expert witness to testify about Debtors' lack of  
16 prospects for greater earning power outside of their chosen  
17 fields. From the excerpts of record, however, it seems to us  
18 that Debtors had little warning that the bankruptcy court was not  
19 satisfied with the answers to its questions and would override  
20 the only evidence before it based on its own view that Debtors  
21 could earn more outside of their fields. The bankruptcy court  
22 should consider on remand whether additional procedures are  
23 required to assure that Debtors have had a fair opportunity to  
24 present rebuttal evidence.<sup>6</sup>

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26 <sup>6</sup> In the analogous context of fee applications, in which  
27 the bankruptcy court has a duty to raise issues even if no party  
28 in interest does so, the Ninth Circuit has cautioned that the  
bankruptcy court sometimes "simulates the role of an adversary,  
(continued...)

1           Whether or not the bankruptcy court permits the parties to  
2 present more evidence, it should articulate its reasoning  
3 regarding partial discharge. In particular it should address the  
4 burden of proof and how it has weighed the equities as permitted  
5 by Saxman.

6           E.   Other issues

7           The parties argue that various issues are grounds for  
8 reversal or affirmance. We disagree that these issues are  
9 dispositive, but some of them may need to be addressed on remand.

10           1.   Loan repayment period

11           Debtors argue that the bankruptcy court erred by assuming  
12 that their student loans would be restructured and the payment  
13 period extended. We disagree.

14           Debtors' only authority is a decision by "[t]his very trial  
15 court judge." In re Hinkle, 200 B.R. 690, 693 (Bankr. W.D. Wash.  
16 1996). The decision in Hinkle holds that the court cannot  
17 "restructure" student loans in the sense that it cannot partially  
18 discharge them -- a premise that has since been overruled by the  
19 Ninth Circuit. Saxman, 325 F.3d 1168. Hinkle also rejected  
20 "speculation" about repayment programs (Hinkle, 200 B.R. at 693

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21  
22           <sup>6</sup>(...continued)  
23 albeit to a circumscribed degree," and it should apprise parties  
24 of "the particular questions and objections it harbors" and give  
25 them "an opportunity to rebut or contest the court's  
26 conclusions." In re Eliapo, 468 F.3d 592, 603 (9th Cir. 2006).  
27 See generally Stewart-Johnson, 319 B.R. at 198-99 (noting  
28 problems with court exercising "a kind of family business  
judgment" under Section 523(a)(8)). Cf. In re Voelkel, 322 B.R.  
138, 146-47 and n.21 (9th Cir. BAP 2005) (even under Section  
707(b), which provides for sua sponte dismissal by bankruptcy  
court based on its own value judgments, it should have notified  
debtor of issues prior to hearing).

1 n.2) but in this case Debtors did not dispute that some sort of  
2 repayment plan would be available to them. We believe that it  
3 was proper for the bankruptcy court to assume that they will  
4 restructure their loans to the extent they can do so. That is  
5 consistent with their obligation to act in good faith (Nys, 446  
6 F.3d at 947; Mason, 464 F.3d at 885) and with the Ninth Circuit's  
7 instruction that, under Brunner's second prong, "the debtor  
8 cannot have a reasonable opportunity to improve her financial  
9 situation, yet choose not to do so." Nys, 446 F.3d at 946. See  
10 also Birrane, 287 B.R. at 495-96 nn.3&5 and 500. We reject  
11 Debtors' argument, which is in essence that if they are unable to  
12 repay their student loans over a ten year period then they need  
13 not repay them at all.

## 14 2. Feasibility of alternative repayment plans

15 Debtors argue in the alternative that even if restructured  
16 payment plans are theoretically possible the bankruptcy court  
17 should not have assumed that such a plan is feasible in this  
18 case. Debtors argue that the ICRP could involve years of  
19 payments that would barely reduce principal or even be inadequate  
20 to pay accruing interest and this allegedly would ruin their  
21 credit ratings. Some repayment plans could result in debt  
22 forgiveness after 25 or 30 years, resulting in a large amount of  
23 imputed income for tax purposes. Debtors claim that the  
24 available restructuring plans would cripple them financially.

25 Debtors have not established that this is necessarily so.  
26 They cite three decisions in which student loans were discharged  
27 despite the debtors' refusal to enter into alternative repayment  
28 plans, but Debtors fail to mention that two of those decisions

1 were reversed. See In re Boykin, 312 B.R. 915 (Bankr. M.D. Ga.  
2 2004), rev'd, 313 B.R. 516 (M.D. Ga.); In re Long, 271 B.R. 322,  
3 332 (8th Cir. BAP 2002), rev'd, 322 F.3d 549 (8th Cir. 2003), on  
4 remand, 292 B.R. 635 (8th Cir. BAP 2003) (no undue hardship,  
5 reversing bankruptcy court).

6 The third decision cited by Debtors recognizes that  
7 repayment plans are "not always a feasible option" but the issue  
8 is when they are feasible and when they are not. In re Korhonen,  
9 296 B.R. 492, 496-97 (Bankr. D. Minn. 2003) (emphasis added).  
10 That decision involved an unemployed, physically and  
11 psychologically impaired homeless man who "could not pay" the  
12 loan even under the repayment plan. Id. Debtors have not  
13 established any similar facts.

14 Nevertheless, the bankruptcy court may need to consider on  
15 remand whether future tax liability, negative credit ratings, or  
16 any other consequences of the available repayment plans would  
17 impose an undue hardship that requires a partial discharge of the  
18 student loan debt. See Birrane, 287 B.R. at 500 n.7 (noting  
19 possibility of tax liability from forgiveness of debt); Korhonen,  
20 296 B.R. at 496-97 (same); In re Sequeria, 278 B.R. 861, 863 n.2  
21 (Bankr. D. Or. 2001) (same); In re Williams, 301 B.R. 62, 78-79  
22 (Bankr. N.D. Cal. 2003) (rejecting argument that not making use  
23 of alternative repayment programs showed lack of good faith, when  
24 debtors calculated that they would be charged with \$300,000 to  
25 \$400,000 of discharge of indebtedness income on eve of their 80th  
26 birthdays).

1           3.    The Government's arguments

2           The Government points out that Debtors incurred a very large  
3 amount of student loan debt -- over \$350,000 owed to the  
4 Government and what Brett's own declaration describes as a total  
5 amount owed to all lenders of "approximately \$600,000" before the  
6 private loans were discharged. The Government objects that  
7 because Debtors chose to pay other debts and took deferments for  
8 economic hardship and other reasons they have paid the Government  
9 only \$52. This may bear on Debtors' good faith, but as the  
10 bankruptcy court recognized the size of the debt cuts both ways:

11           In the first place, it is difficult to imagine these  
12 two debtors receiving advanced degrees as a result of  
13 student loans in the amounts of hundreds of thousands  
14 of dollars and not wanting to pay anything for their  
15 education. On the other hand, it is incredible that  
the various lenders here would advance to these debtors  
student loans in the amounts they did and at the same  
time expect to get paid in full.

16 Transcript, March 16, 2006, at 3:11-18. See also Nys, 446 F.3d  
17 at 945 n.6 ("We cannot fault a debtor for [choosing which skills  
18 she will pursue during her education] when, later on, it turns  
19 out that despite her best efforts her skills are simply not  
20 sufficient to allow her to earn adequate sums to repay  
21 accumulated principal and interest."). Cf. Educ. Credit Mgmt.  
22 Corp. v. DeGroot, 339 B.R. 201, 212-13 (D. Or. 2006) ("choosing  
23 to incur debt in pursuit of an education later in life is a  
24 decision within the debtor's control, and simply because things  
25 do not work out as the debtor had hoped does not make age alone a  
26 sufficient reason to discharge student loans").

27           The Government argues that Brett could earn more by working  
28 on a contract basis but according to Brett that work rarely lasts

1 more than one year, it does not include benefits, sick days, or  
2 paid holidays, and it would require him to move around the  
3 country which is disruptive to the children and Janeth's ability  
4 to find work. A debtor has an obligation to maximize income,  
5 perhaps even by accepting part time work or work outside of a  
6 chosen field. Birrane, 287 B.R. at 498 ("there is nothing in the  
7 record that indicates Birrane [who had paying work approximately  
8 25 hours per week] is unemployable in other areas . . . although  
9 her hourly pay may be less than what she is used to"). On the  
10 other hand there are limits to what a debtor and his or her  
11 family must do to maximize income. See Nys, 308 B.R. at 442  
12 (debtor was "51 years old and has lived in Humboldt County for  
13 more than 20 years, having a home and family ties there, making  
14 moving an unavailable option"); Nys, 446 F.3d at 945 n.6  
15 (rejecting argument by lender that "the debtor must either uproot  
16 her family and move, or switch careers to try to obtain a higher  
17 paying job").

18 We do not mean to suggest that the bankruptcy court  
19 necessarily has to reach all of these issues, or is limited to  
20 these issues. See also Nys, 446 F.3d at 947 (listing numerous  
21 factors). We have addressed them because the parties have  
22 briefed them and have argued that they are dispositive. They are  
23 not.

## 24 **V. CONCLUSION**

25 Debtors incurred a huge amount of student debt. Having paid  
26 almost nothing on that debt they now seek to discharge it all,  
27 despite being young, healthy, and highly educated. Congress has  
28 set a high bar for discharging student loan debts and based on

1 the excerpts of record we cannot say that Debtors are entitled to  
2 a full discharge of that debt. At the same time, the bankruptcy  
3 court found that Debtors could never pay the full amount of their  
4 debt unless one or both of them wins the lottery. Therefore, if  
5 they can satisfy the bankruptcy court that they have met their  
6 burdens to prove their good faith and to establish how much debt  
7 they will be unable to pay without undue hardship, they should be  
8 entitled to a partial discharge. The bankruptcy court's ruling  
9 to the contrary is REVERSED and the case is REMANDED.

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