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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	WW-07-1454-KJuKu
	)		
CALLEN JAMES BLACKBIRD,	)	Bk. No.	06-43180
	)		
Debtor.	)	Adv. No.	07-04039
	)		
_____	)		
EDUCATIONAL CREDIT	)		
MANAGEMENT CORPORATION,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
CALLEN JAMES BLACKBIRD,	)		
	)		
Appellee.	)		
_____	)		

Argued and Submitted on  
June 18, 2008 at Seattle, Washington

Filed - July 11, 2008

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

Honorable Paul B. Snyder, Bankruptcy Judge, Presiding

Before: KLEIN, JURY, and KURTZ,\*\* Bankruptcy Judges.

\*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

\*\*Hon. Frank Kurtz, Chief Judge for the U.S. Bankruptcy Court for the Eastern District of Washington, sitting by designation.

1           This case involves the "undue hardship" provision of 11  
2 U.S.C. § 523(a)(8). The creditor-appellant appeals a bankruptcy  
3 court order granting discharge to the debtor of a \$217,920  
4 student loan debt as an undue hardship. The debtor, 53 years old  
5 at the time of trial, spent about 18 years attending various post  
6 secondary schools specializing in chiropractic and general  
7 medicine and ultimately became employed as a customer service  
8 representative unrelated to his education. The bankruptcy court  
9 concluded that the debtor met the three-part undue hardship test  
10 under Brunner v. New York State Higher Educ. Svcs. (In re  
11 Brunner), 831 F.2d 395 (2nd Cir. 1987), which has been adopted by  
12 the Ninth Circuit in United Student Aid Funds v. Pena (In re  
13 Pena), 155 F.3d 1108 (9th Cir. 1998).

14           We agree with the bankruptcy court's holding on the first  
15 and second prongs of the Brunner test that the debtor proved he  
16 could not maintain a minimal standard of living if forced to  
17 repay the loans and that additional circumstances existed  
18 indicating his state of affairs would likely persist for a  
19 significant portion of the repayment period.

20           However, we REVERSE on account of the third prong of the  
21 Brunner test that requires the debtor affirmatively to prove good  
22 faith efforts to repay the loan. The bankruptcy court applied an  
23 incorrect legal standard in its reasoning that the debtor's  
24 demonstration that he did "not lack good faith" was sufficient to  
25 establish affirmative good faith. Hence, the \$217,920 student  
26 loan debt to Educational Credit Management Corporation ("ECMC")  
27 is not discharged as an undue hardship.

28

FACTS

At the time of trial, the debtor Callen James Blackbird was a 53-year-old single person with no dependents. After graduating from college in 1976 with a degree in communications, the debtor attended various post secondary schools specializing in chiropractic and general medicine from 1988 through 2006.<sup>1</sup>

The debtor's Social Security Statement setting forth his earnings for the last twenty years indicated that he earned the most in 1988 and 1994 at a little over \$24,000, that he averaged about \$7,950 for the remaining years from 1987 to 1995, and that he did not earn any income for the years 1996 to 2004.<sup>2</sup> For the

<sup>1</sup>The colleges and universities attended by the debtor and the degrees earned are as follows:

<u>College</u>	<u>Degree</u>	<u>Date Earned</u>	<u>Attended</u>
University of Wisconsin - Green Bay	BS Communications	May 1976	
Breneau University	Pre-Med		May 1988 - August 1989
Life College, School of Chiropractic	Doctor of Chiropractic	May 1993	
Medical University of the Americas (West Indies and Belize)	Medicine		January 2001 - December 2002
St. Christopher's College of Medicine (Luton, England)	Medicine		June 2003 - June 2005
University of Missouri (Kansas City, Missouri)	Part I of board preparation		January 2006 - May 2006

<sup>2</sup>Specifically, the debtor's last twenty years of earnings as set forth in his Social Security Statement are:

(continued...)

1 years 2001 through 2004, the debtor did not file federal income  
 2 tax returns.<sup>3</sup>

3 After receiving his chiropractic degree in May 1993 at age  
 4 38, the debtor worked as a chiropractor for two years before  
 5 being laid off due to lack of patients in May 1995. From 1995 to  
 6 2000, the debtor became self-employed using his recreational  
 7 vehicle as a mobile office, filling in for vacationing  
 8 chiropractors. The debtor did not have reported income from his  
 9 chiropractic practice from 1996 to 2000 because his earnings were  
 10 minimal during this time, both due to intermittent shoulder pain  
 11

12 <sup>2</sup>(...continued)

<u>Year</u>	<u>Social Security Income</u>	<u>Year</u>	<u>Social Security Income</u>
2006	Not yet recorded	1996	0.00
2005	638.00	1995	10,966.00
2004	0.00	1994	24,300.00
2003	0.00	1993	10,983.00
2002	0.00	1992	7,990.00
2001	0.00	1991	7,549.00
2000	0.00	1990	7,333.00
1999	0.00	1989	8,742.00
1998	0.00	1988	24,478.00
1997	0.00	1987	2,085.00

22 <sup>3</sup>Although the debtor did not file federal tax returns for  
 23 the years 2001 through 2004, earnings from the debtor's last few  
 24 years reported on his federal tax returns are summarized as  
 follows:

<u>Year</u>	<u>Wages, Salaries, etc.</u>	<u>Net Business Income</u>	<u>AGI</u>	<u>Federal Tax Refund/Due</u>
2006	0.00	0.00	0.00	0.00
2005	0.00	690.00	641.00	(49.00)
2000	0.00	2,817.00	2,655.00	(197.00)

1 he suffered from a previous skydiving injury<sup>4</sup> that interfered  
2 with his chiropractic work and due to expenses of his mobile  
3 office operations often exceeding his income.

4 As noted, the debtor injured his shoulder in a skydiving  
5 accident. Although the debtor never consulted a medical doctor  
6 to determine whether his injury would limit him in working, the  
7 debtor decided that he would have to seek work other than as a  
8 chiropractor. The debtor admitted that he does not suffer from  
9 any medical condition which has been deemed by any physician to  
10 affect his ability to work and earn money.

11 In January 2001, the debtor decided to attend medical school  
12 and was accepted into a foreign international program at the  
13 Medical University of the Americas (West Indies and Belize). The  
14 debtor subsequently spent an additional two years in a clinical  
15 program at St. Christopher's College of Medicine in England from  
16 June 2003 to June 2005.

17 The debtor attempted and twice failed (once in May 2003 and  
18 again in December 2006) to pass the first of two parts to his  
19 medical board examinations. He was 51 years old at this point.

20 Several days before he failed his medical exam the second  
21 time, on December 20, 2006, the debtor filed for chapter 7  
22

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23 <sup>4</sup>The Memorandum Decision issued on November 3, 2007 states  
24 that the debtor injured his shoulder while skydiving in June 1994  
25 which interfered with his chiropractic work and eventually led  
26 him to decide to seek alternative employment. See Memorandum  
27 Decision at 4:11.5-18.5. The appellant's brief, however, states  
28 that the debtor testified that he injured his shoulder in a  
skydiving accident around May 2000, which led him to decide he  
could no longer work as a chiropractor. See Appellant's Br. at  
3. It is unclear whether these are the same shoulder injuries or  
different.

1 bankruptcy relief with the primary intention of discharging his  
2 student loans.

3 One month later, the debtor began a job for the first time  
4 in twelve years, working full-time as a customer service  
5 representative for Lowe's Home Furnishing Center, earning  
6 approximately \$26,210 per year or \$2,016 monthly gross. The  
7 debtor's net monthly income is \$1,661.

8 According to the debtor, his monthly expenses total \$2,177.  
9 However, a significant amount of his income is spent eating at  
10 restaurants and on satellite TV, radio, and EarthLink. The  
11 debtor has not taken a vacation in recent memory and owns  
12 approximately \$25,000 in assets. He regularly skydives, which he  
13 testified costs him \$165 per year on average, and he recently  
14 spent several thousand dollars on photography equipment to use  
15 while skydiving.

16 On March 15, 2007, he filed an adversary proceeding against  
17 the appellant ECMC and others<sup>5</sup> seeking that his student loans be  
18 discharged based upon undue hardship under 11 U.S.C. § 523(a)(8).  
19 Since only ECMC has appealed, only ECMC's consolidation loan<sup>6</sup> of  
20 approximately \$217,920 attributable to his education as a  
21 chiropractor is at issue in this appeal.<sup>7</sup>

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22  
23 <sup>5</sup>In addition to ECMC, the other co-defendants were Key Bank,  
24 NA; Sallie Mae, Inc.; American Educational Services; and The  
Education Resources Institute.

25 <sup>6</sup>The loans that were consolidated into the ECMC loan  
26 (approximately eleven) were incurred during the debtor's  
27 attendance at Life College, School of Chiropractic to earn a  
degree and become a Doctor of Chiropractic Medicine.

28 <sup>7</sup>ECMC is a private, non-profit guaranty agency in the  
Federal Family Education Loan Program, which makes loans  
(continued...)

1 The debtor did not make any payments on the ECMC loan from  
2 the first payment date of April 21, 1994 through the date the  
3 bankruptcy was filed, December 20, 2006. He suspended all  
4 payments by numerous applications for unemployment deferment and  
5 hardship forbearance.

6 Although the ECMC loan qualifies for the William D. Ford  
7 Federal Direct Loan Program ("Ford Program"), the debtor did not  
8 apply for acceptance into this program.<sup>8</sup> If the ECMC loan were  
9 reconsolidated into the Ford Program, the debtor's estimated  
10 monthly payment for ECMC's loan would be \$266.67 over a 25-year  
11 term under the Income Sensitive Repayment Plan.<sup>9</sup>

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13 <sup>7</sup>(...continued)  
14 available to student borrowers to attend eligible institutions of  
15 higher education without regard to a student's age or  
16 creditworthiness. Guaranty agencies, such as ECMC, guarantee  
17 such loans against default or bankruptcy and are, in turn,  
reinsured by the United States Department of Education. 20  
U.S.C. §§ 1085(j), 1078(c).

18 <sup>8</sup>The Ford Program is a federal financial aid program almost  
19 identical to the Federal Family Education Loan Program, except  
20 that the federal government is the lender and the funds are  
21 delivered directly to the school. National Association for  
22 College Admission Counseling, Focus on Financial Aid: Terminology  
and Words to Know,  
<http://www.nacacnet.org/MemberPortal/News/StepsNewsletter/Terminology+and+Words+to+Know.htm> (last visited June 10, 2008).

23 <sup>9</sup>The Income Sensitive Repayment Program is an alternative to  
24 income contingent repayment for loans serviced by lenders in the  
25 Federal Family Education Loan Program. It is designed to make it  
26 easier for borrowers with lower paying jobs to make their monthly  
27 loan payments. The monthly loan payment is pegged to a fixed  
28 percentage of gross monthly income, between 4 percent and 25  
percent. The percentage is determined by the borrower and the  
resulting monthly payment must be greater than or equal to the  
interest that accrues. The SmartStudent Guide to Financial Aid,  
<http://www.finaid.org/loans/isr.phtml> (last visited June 10,  
2008).

1           Having considered the record following a one-day trial, the  
2 bankruptcy court held that the debtor met all three prongs of the  
3 Brunner undue hardship test by a preponderance of the evidence as  
4 to the ECMC loan and concluded that the loan to ECMC was  
5 discharged.<sup>10</sup> See Brunner, 831 F.2d at 395.

6           The court reasoned that, although the debtor may have  
7 qualified for the Ford Program, it is not a lack of good faith to  
8 have not applied for it due to his nonexistent income during the  
9 aforementioned period and the fact that he was approved for ECMC  
10 deferments. The court also considered the debtor's lack or small  
11 amount of available net income and the substantial amount of debt  
12 on the other loans that would need to be paid, in addition to  
13 possible adverse tax consequences, in concluding that the debtor  
14 did not lack good faith.

15           The order granting discharge of the ECMC loan and its  
16 written memorandum decision was entered November 30, 2007.

17           ECMC timely appealed.

18 \_\_\_\_\_  
19           <sup>10</sup>The total student loan debt was about \$690,000. The  
20 bankruptcy court also ruled that the student loans of The  
21 Education Resources Institute #001 through #004 and KeyBank were  
22 discharged pursuant to 11 U.S.C. § 523(a)(8). However, as to the  
23 student loans of Sallie Mae and The Education Resources Institute  
24 #006 that the debtor obtained to finance a review course for his  
25 medical board examination, the bankruptcy court concluded that  
26 the debt was not discharged because the debtor did not establish  
27 by a preponderance of the evidence that he acted in good faith.  
28 The bankruptcy court denied discharge of these loans because (1)  
the debtor received these loan proceeds within one year of filing  
bankruptcy, (2) he used the majority of the money for non-  
educational purposes, and (3) he left the review course without  
completing it and did not contact the lenders nor return the  
unused funds. The debtor did not appeal the bankruptcy court's  
order. While the appellee and KeyBank separately appealed the  
bankruptcy court's order, KeyBank voluntarily dismissed its  
appeal on February 7, 2008.



1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C.  
3 § 1334(b) over this core proceeding under 28 U.S.C. § 157(b) (2).  
4 We have jurisdiction under 28 U.S.C. § 158(a) (1).

5 ISSUE

6 Whether the requirement to establish affirmative good faith  
7 was satisfied by the conclusion that the debtor "did not lack"  
8 good faith in connection with student loan debt alleged to be  
9 discharged as an undue hardship per 11 U.S.C. § 523(a) (8).

10 STANDARDS OF REVIEW

11 The bankruptcy court's findings of fact are reviewed for  
12 clear error. Pena, 155 F.3d at 1110. Issues of law are reviewed  
13 de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),  
14 369 B.R. 506, 509 (9th Cir. BAP 2007).

15 We review mixed questions of law and fact de novo. Murray  
16 v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. 1997). A  
17 mixed question exists when the facts are established, the rule of  
18 law is undisputed, and the issue is whether the facts satisfy the  
19 legal rule. Id. Mixed questions require consideration of legal  
20 concepts and the exercise of judgment about the values that  
21 animate legal principles. Id.

22 Whether repayment of student loan debt imposes an undue  
23 hardship on a debtor in bankruptcy is such a question reviewed de  
24 novo. Rifino v. United States (In re Rifino), 245 F.3d 1083,  
25 1086-87 (9th Cir. 2001); Pa. Higher Educ. Assistance Agency v.  
26 Birrane (In re Birrane), 287 B.R. 490, 493 (9th Cir. BAP 2002);  
27 see also Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour),  
28 433 F.2d 393, 398 (4th Cir. 2005).

1 DISCUSSION

2 ECMC contends that the court erred in concluding that the  
3 debtor's student loan debt to ECMC was discharged under 11 U.S.C.  
4 § 523(a)(8) as an undue hardship upon the debtor.

5 Before reaching the merits of this case, we first clarify  
6 the appropriate standard of review.

7 I

8 The debtor appears to argue that the bankruptcy court's  
9 conclusion, that repayment of the student loan would impose an  
10 undue hardship, was not clearly erroneous. This is the incorrect  
11 standard of review. Whether repayment of student loan debt  
12 imposes an undue hardship on a debtor in bankruptcy is a mixed  
13 question of law and fact that is reviewed de novo. See Rifino,  
14 245 F.3d at 1086-87; Birrane, 287 B.R. at 493. It is a legal  
15 conclusion that is based on the debtor's individual factual  
16 circumstances, which qualifies as a mixed question of law and  
17 fact. See Frushour, 433 F.2d at 398. The analysis of the  
18 application of the good faith standard is not reviewed on the  
19 deferential standard of clearly erroneous.

20 ECMC does not quarrel with the factual findings, but rather  
21 asserts that the legal conclusions based on those facts do not to  
22 satisfy the debtor's burden of proof to show undue hardship on  
23 each of the three Brunner prongs.

24 Thus, while we are obliged to accept a trial court's  
25 findings of fact unless clearly erroneous, we review de novo the  
26 legal conclusions as to the legal effect of those findings in  
27 determining whether the debtor has met the undue hardship  
28 standard. See Rifino, 245 F.3d at 1087 n.2.

1 II

2 Generally, student loan obligations are presumed to be  
3 nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(8).  
4 A discharge, however, under 11 U.S.C. § 727 does not discharge an  
5 individual debtor from any debt for an educational benefit  
6 overpayment or loan made, insured, or guaranteed by a  
7 governmental unit, "unless excepting such debt from discharge  
8 under this paragraph would impose an undue hardship on the  
9 debtor." 11 U.S.C. § 523(a)(8).

10 Although "undue hardship" is not defined in the Bankruptcy  
11 Code, the Ninth Circuit has recognized that the existence of the  
12 adjective "undue" indicates that Congress viewed "garden-variety  
13 hardship as insufficient excuse for a discharge of student  
14 loans." Pena, 155 F.3d at 1111.

15 To determine if excepting student obligations from discharge  
16 will impose an undue hardship on a debtor, the Ninth Circuit has  
17 adopted the three-prong test established by the Second Circuit in  
18 Brunner. See Pena, 155 F.3d at 1112. To obtain a discharge of a  
19 student loan debt, the debtor must prove all of the following by  
20 a preponderance of the evidence:

21 (1) that the debtor cannot maintain, based on current  
22 income and expenses, a "minimal" standard of living for  
23 herself and her dependents if forced to repay the  
24 loans; (2) that additional circumstances exist  
25 indicating that this state of affairs is likely to  
26 persist for a significant portion of the repayment  
27 period of the student loans; and (3) that the debtor  
28 has made good faith efforts to repay the loans.

26 Brunner, 831 F.2d at 396; Pena, 155 F.3d at 1111; Birrane, 287  
27 B.R. at 494.

28 Under this test, the burden of proving undue hardship is on

1 the debtor, and the debtor must prove all three elements before  
2 discharge can be granted. Rifino, 245 F.3d at 1088. If the  
3 debtor does not satisfy any one of these requirements, the  
4 bankruptcy court's inquiry must end there, with a finding of no  
5 dischargeability. Rifino, 245 F.3d at 1088.

6 A

7 The first prong of the Brunner test requires that the debtor  
8 prove that he cannot maintain a minimal standard of living if he  
9 were required to repay the loans. Rifino, 245 F.3d at 1088.

10 The bankruptcy court found that, even assuming some of his  
11 expenses were not reasonably necessary (restaurant meals,  
12 skydiving expenses, internet/cable services) and reduced by  
13 several hundred dollars a month, there still would be little  
14 remaining every month after deducting the debtor's current  
15 expenses from current income. The court concluded that the  
16 evidence did not establish that such a modest decrease in the  
17 debtor's expenses would be adequate to fully amortize or even pay  
18 interest on the entire amount of his student loan debt.

19 At trial, the debtor testified about his difficulty in  
20 finding a job in the medical field because he was either  
21 overqualified, underqualified, or too old to pursue any  
22 alternative position within the field. ECMC argues that the  
23 debtor has not maximized his efforts to search for a job that  
24 pays more than \$26,000 a year, especially given that he holds two  
25 doctorate degrees and is in relatively good health. ECMC further  
26 argues that this was the first job the debtor secured after he  
27 could no longer live on his student loans and that the debtor  
28 admitted he has not looked for a better-paying job since

1 beginning work at Lowe's.<sup>11</sup> ECMC contends that the debtor's "pat  
2 testimony" is insufficient to satisfy his burden to prove the  
3 first prong.

4 While a close question is presented here, we cannot say the  
5 bankruptcy court's finding, that the debtor's reductions would be  
6 minimal and inconsequential even assuming that some of his  
7 expenses were unnecessary, was clearly erroneous.

8 In Rifino, the debtor's budget contained unnecessary items  
9 such as tanning, cable television, and a new car. Rifino, 245  
10 F.3d at 1088. While the Ninth Circuit in Rifino recognized that  
11 some courts have declined to discharge student loan debt where  
12 the debtor's budget included items such as cable television, a  
13 new car, and private schooling for a child, and though a close  
14 question was presented, the Ninth Circuit refused to disturb the  
15 bankruptcy court's conclusion that the debtor met her burden of  
16 proof in showing that her standard of living would fall below a  
17 minimal level if she were required to repay her student loans.  
18 Rifino, 245 F.3d at 1088.

19 In the same manner, we decline to disturb the ruling on the  
20 first prong. Accordingly, we hold that the court did not err in  
21 concluding that the debtor proved the first prong of the Brunner  
22 test by a preponderance of evidence that he could not maintain a  
23 "minimal" standard of living if forced to repay the loan.

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25 <sup>11</sup>ECMC notes that, although the duty to maximize income is  
26 relevant to the third "good faith" prong of the Brunner test, it  
27 also seems appropriate to analyze whether the debtor is  
28 maximizing income when analyzing the first prong of whether the  
debtor's income is sufficient to maintain a minimal lifestyle.  
See Appt's Reply Br. at 9 n.7.

1  
2 The second Brunner prong requires a debtor to prove that  
3 "additional circumstances exist indicating that this state of  
4 affairs is likely to persist for a significant portion of the  
5 repayment period of the student loans." Brunner 831 F.2d at 396.

6 The Ninth Circuit recently clarified that a debtor does not  
7 have a separate burden to prove "additional circumstances,"  
8 beyond the inability to pay in the present or in the future.  
9 Educ. Credit Mgmt. Corp. v. Nys (In re Nys), 446 F.3d 938, 945  
10 (9th Cir. 2006) (trial court erred in requiring debtor to show  
11 exceptional circumstances beyond the inability to pay in the  
12 present and likely inability to pay in the future).

13 The circumstances need be "exceptional" only in the sense  
14 that they demonstrate insurmountable barriers to the debtor's  
15 financial recovery and ability to pay. Nys, 446 F.3d at 946.

16 The Ninth Circuit in Nys reasoned that the debtor cannot  
17 purposely choose to live a lifestyle inimical to repaying student  
18 loans. Nys, 446 F.3d at 946. In other words, a debtor cannot  
19 expect to discharge student debt following rejection of a  
20 reasonable opportunity to improve a financial situation. Nys,  
21 446 F.3d at 946.

22 However, the Ninth Circuit also reasoned that, at the same  
23 time, it could not fault the debtor for having made reasonable  
24 choices that now inhibited the ability substantially to increase  
25 income in the future. Nys, 446 F.3d at 946.

26 Here, recognizing that the debtor is relatively healthy at  
27 53 years old and well-educated, the court found additional  
28 circumstances existed in that his shoulder injury precluded him

1 from becoming a chiropractor again, that there was no evidence he  
2 would be any more successful monetarily than he was while working  
3 as a chiropractor from 1995 to 2000, and that there was no  
4 evidence that he would be more successful twelve years later at  
5 age 53. The court further found that it was doubtful he could  
6 obtain the financing necessary to give him the opportunity to  
7 become financially successful as a chiropractor, not to mention  
8 the start-up costs, re-education, and insurance of being self-  
9 employed.

10 In addition, the court found that, even though the debtor is  
11 well-educated, his education is of little value if he cannot be a  
12 chiropractor and his basic job skills otherwise appear to be  
13 minimal. It reasoned that there was no evidence that the debtor  
14 is qualified now, or that retraining or relocation would qualify  
15 the debtor in the future, for any employment that would allow him  
16 to pay his student debt.

17 ECMC argues that the court's reliance on the debtor's age,  
18 amount of debt, earning history, and education as "additional  
19 circumstances" is incorrect because the debtor voluntarily chose  
20 to return to school later in life, earning his chiropractic  
21 degree at age 38 and medical degree at age 51. ECMC contends  
22 that what it views as poor choices disqualify the debtor from  
23 making age or amount of debt circumstances that present an  
24 insurmountable barrier to financial recovery and ability to pay.

25 The bankruptcy court was not persuaded by ECMC's  
26 counterargument. Nor are we.

27 As the Ninth Circuit instructed in Nys, bankruptcy courts  
28 may look to the unexhaustive list of "additional circumstances"

1 provided by the BAP in Nys v. Educ. Credit Mgmt. Corp. (In re  
2 Nys), 308 B.R. 436, 446-47 (9th Cir. BAP 2004), which includes:  
3 the limited number of years remaining in the debtor's work life  
4 to allow payment of the loan, age or other factors that prevent  
5 retraining or relocation as a means for payment of the loan, lack  
6 of assets, and lack of better financial options elsewhere. Nys,  
7 446 F.3d at 947.

8 We agree with the trial court that a preponderance of  
9 evidence indicates that additional circumstances exist indicating  
10 that the debtor's state of affairs is likely to persist for a  
11 significant portion of the repayment period.

12 C

13 The final prong of the Brunner test requires that the debtor  
14 affirmatively demonstrate good faith in his efforts to repay the  
15 student loan. Pena, 155 F.3d at 1114.

16 Good faith is measured by the debtor's efforts to obtain  
17 employment, maximize income, and minimize expenses. Educ. Credit  
18 Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 884 (9th Cir.  
19 2006) (citing with approval Pa. Higher Educ. Assistance Agency v.  
20 Birrane (In re Birrane), 287 B.R. 490, 499 (9th Cir. BAP 2002)).

21 Courts will also consider a debtor's effort – or lack  
22 thereof – to negotiate a repayment plan, although a history of  
23 making or not making payments is, by itself, not dispositive.  
24 Mason, 464 F.3d at 884; Birrane, 287 B.R. at 499-500.

25 ECMC argues that the debtor has not shown good faith because  
26 he has not made a single payment on his student loan debt and has  
27 not maximized his income by taking all reasonable efforts to  
28 obtain the highest-paying employment given his two doctorate



1 degrees. Furthermore, ECMC contends that the debtor's rejection  
2 of an alternative repayment option under the Ford Program and his  
3 admission that he filed for bankruptcy primarily to discharge his  
4 student loans less than one year after the loans went into  
5 repayment evidence a lack of good faith.

6 The court concluded that the third prong of the Brunner test  
7 was satisfied because it could not be considered a lack of good  
8 faith that the debtor did not enter the Ford Program due to his  
9 nonexistent income during the aforementioned period and the fact  
10 that he was approved by ECMC for unemployment deferments and  
11 hardship forbearances. The court also considered the debtor's  
12 lack or small amount of available net income, the substantial  
13 amount of other loans that would need to be paid, and the  
14 possible adverse tax consequences, to conclude that it was not a  
15 lack of good faith for the debtor not to have applied for  
16 acceptance into the Ford Program.

17 The court erred in this regard. It examined the third prong  
18 of the Brunner test under an incorrect standard of the law. A  
19 demonstration that one does not lack good faith does not equate  
20 to affirmative proof of good faith.

21 As ECMC argues, the inquiry is not whether the debtor did  
22 not demonstrate a lack of good faith. Rather, the correct  
23 inquiry is whether the debtor demonstrated affirmative good faith  
24 efforts to repay his loan.

25 In one of its most recent decisions on 11 U.S.C.  
26 § 523(a)(8), the Ninth Circuit held that the debtor was required  
27 to exhibit affirmative good faith efforts to repay his loan  
28 through diligently pursuing options, such as the Income

1 Contingent Repayment Plan ("ICRP"), when available. Mason, 464  
2 F.3d at 885.

3 The Ninth Circuit also cited Birrane, a BAP decision, which  
4 reversed the bankruptcy court because the debtor there did not  
5 use her "best efforts to maximize her income" and failed to take  
6 steps towards re-negotiating a repayment schedule under ICRP.  
7 Mason, 464 F.3d at 884; See Birrane, 287 B.R. at 499-500.

8 In this case, we are not persuaded that the debtor has  
9 exhibited a good faith effort to maximize his income. Despite  
10 his doctorate education, the debtor's employment at a home  
11 improvement retailer is his first job in ten years obtained  
12 ostensibly because his loan funds were running out.

13 The debtor may not willfully or negligently cause his own  
14 default, but rather his condition must result from "factors  
15 beyond his reasonable control." Birrane, 287 B.R. at 500.  
16 Working at Lowe's as a customer service representative, in which  
17 his on-call status precludes him from obtaining additional work  
18 for additional income, is not a factor beyond the debtor's  
19 reasonable control. The debtor has not used his best efforts to  
20 maximize his income, and, thus, we cannot conclude that a good  
21 faith effort to repay his loan has been made.

22 Moreover, while we are mindful that negotiating a repayment  
23 plan is not required to demonstrate good faith effort, it is a  
24 factor considered by courts. See Mason, 464 F.3d at 884;  
25 Birrane, 287 B.R. at 499-500. The debtor in Mason appeared to  
26 have made some previous efforts to negotiate repayment of his  
27 debt; however, even then, the Ninth Circuit concluded that his  
28 efforts were inadequate because he did not pursue the option of

1 renegotiating his debt under the ICRP with diligence. Mason, 464  
2 F.3d at 885. While we do not understand Mason to make the ICRP a  
3 sine qua non and understand that 11 U.S.C. § 523(a)(8) is an  
4 independent concept, Mason does confirm that pursuit of ICRP is  
5 evidence that is probative of good faith.

6 Here, the record does not establish that the debtor took any  
7 steps to negotiate an alternative repayment method to his loan,  
8 such as consolidating in an ICRP. In fact, he never attempted to  
9 repay any amount of his loan since it came due. Even if the  
10 debtor indicated at trial an understanding and awareness of  
11 consolidation programs available to him, the debtor did not  
12 pursue with diligence the option of alternative repayment  
13 methods. The evidence does not add up to an affirmative  
14 demonstration of good faith.

15 Accordingly, we conclude that the court erred in determining  
16 that the debtor satisfied the good faith prong of Brunner by  
17 reasoning that the debtor did not demonstrate a lack of good  
18 faith. The debtor must affirmatively show he made good faith  
19 attempts to repay.

20 If one of the elements of the three-part Brunner test is not  
21 established, then a dischargeable 11 U.S.C. § 523(a)(8) "undue  
22 hardship" has not been affirmatively demonstrated. Rifino, 245  
23 F.3d at 1088. The conclusion that the debtor did not lack good  
24 faith does not suffice.

25 Thus, the order discharging the debtor's student loan to  
26 ECMC lacks adequate foundation.

#### 27 CONCLUSION

28 Because there has not been adequate demonstration of good

1 faith efforts to repay the debtor's \$217,920 student loan debt to  
2 ECMC as required to establish 11 U.S.C. § 523(a)(8) "undue  
3 hardship," the judgment of the bankruptcy court, only to the  
4 extent that it affects the ECMC debt, is REVERSED.

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