First Circuit

10.15.10

Harris v. HSBC Bank US, N.A., 2010 U.S. Dist. Lexis 102726 (D. Mass. 9/28/10)(Michael A. Ponsor, District Judge).
Pro se Debtor appealed to the District Court, the Bankruptcy Court's denial of its motion to reconsider dismissal of his adversary proceeding and lifting the automatic stay; and, also sought leave to appeal. District Court denied as moot debtor's "leave to appeal" because the order at issue was a final order, and reversed the Bankruptcy Court's decision denying the motion for reconsideration, remanding the matter for further proceedings. Essentially, debtor argued that the creditor lacked standing to bring a foreclosure action because the creditor could not show that it was ever assigned the note; and, if it could not plausibly explain how it was assigned the note then the creditor had no right to enforce the note, no standing to foreclose on the mortgaged property and no colorable claim to the estate property. District Court on appeal held that the debtor was entitled to have the Bankruptcy Court address his argument that the creditor could not prove that the note had been assigned to it. The Court gave some latitude to the procedural standards as applied to the *pro se* litigant.

Bronsdon v. Educational Credit Mgmt Corp., 2010 Bankr. Lexis 3092 (BAP 1st Cir. 9/21/10)(Before Judges Haines, Lamoutte, and Tester; Opinion by Judge Lamoutte).
Creditor unsuccessfully appealed Bankruptcy Court's decision to the Bankruptcy Appellate Panel, challenging for the second time the Bankruptcy Court's finding that the debtor's failure to participate in the Ford Federal Direct Loan Program was insufficient to overcome a finding of undue hardship under 11 U.S.C. Section 523(a)(8). The Ford Program allows student loans to be consolidated and payments on the loans to be adjusted based on a formula that takes into account poverty guidelines and the debtor's adjusted gross income, with possible adverse tax consequences to the debtor. Debtor was a 63 year old single woman, who financed law school through student loans but failed to pass the bar exam multiple times by a wide margin. She had been unable to remain gainfully or steadily employed, lived on social security, owned no real property and but for living in the den of her father's home would be homeless.

The Bankruptcy Court initially determined that repayment of the student loans would impose an undue hardship on the debtor, and discharged the loans, which the creditor appealed to the District Court. The District Court remanded the matter for the Bankruptcy Court to consider the impact that participation in the Ford Program would have on the undue hardship analysis. On remand, the Bankruptcy Court concluded that the Debtor's failure to participate in the Ford Program was insufficient to overcome a finding of undue hardship, which the creditor appealed, this time to the BAP.

The Bankruptcy Code does not define "undue hardship" and courts have struggled with its meaning. After several decades of case law interpreting this term, essentially two tests have emerged, the *Brunner* test and the "totality of the circumstances" test. The First Circuit has noted that nine circuit courts of appeal have followed the Second Circuit's test set forth in the *Brunner* case. This is a tripartite test, requiring that the debtor show inability, at her current level of income and expenses, to maintain a "minimal" standard of living; the likelihood that this inability will persist for a significant portion of the repayment period; and the existence of good faith efforts to repay the loans. A facially different test is the Eighth Circuit's totality-of-circumstances test, which would have courts consider the debtor's reasonably reliable future financial resources, her reasonably necessary living expenses, and any other relevant facts. Although the First Circuit has acknowledged the two approaches, it has declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in the First Circuit.

The Bankruptcy Appellate Panel in this case noted that Panel has declined to endorse a particular test as well, although most of the Bankruptcy Courts within the First Circuit have adopted the totality of circumstances test over the *Brunner* test, although a few follow *Brunner.* The "totality of the circumstances" analysis requires a debtor to prove by a preponderance of evidence that (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him

from paying the student loans in question i.e. *Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?* The "totality test" looks to past, present, and future "financial resources" and "necessary living expenses" and whether, taken together with other factors, the debtor has the ability to repay while maintaining a minimal standard of living. *Brunner* asks the same question looking to "current" income and expenses, then considers whether circumstances inhibiting repayment will endure. The Panel has stated that the only practical difference between the two tests is that under *Brunner* the debtor must establish that she has made a good faith effort to repay the loans.

Undue hardship is measured as of trial date, and is a forward-looking concept. Placing emphasis on prepetition failure to pay misconstrues the wording of the undue hardship requirement in the statute. As stated before, distilled to its essence, the finding of undue hardship rests on one basic question: "Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" Answering said question leads the Bankruptcy Court to discharge its task of making "a principled determination of the requirement's meaning and a careful review of the debtor's circumstances."

Having considered the various tests used to determine undue hardship, the plain text of Section 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declined to adopt the *Brunner* test as requested by the appealing creditor. The Panel was persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of Section 523(a)(8).

Marks v. Braunstein, 2010 U.S. Dist. Lexis 95700 (D. Mass. 9/14/10)(Nathaniel M. Gorton, District Judge).

Bankruptcy Court's denial to creditor to assert a lien was affirmed on appeal to the District Court. Essentially, creditor was unable to locate his promissory note, which he found one week after the trial. Creditor did not meet his trial proofs under the UCC 3-309 test for lost, destroyed or stolen promissory notes because he could not show that he was ever in possession of the note. Thus, because, at the time of the hearing, the creditor did not meet the requirements of UCC 3-309 for proving the existence and terms of the note through secondary evidence, the Bankruptcy Judge properly denied the creditor's Lien Motion. Creditor cited to a number of Massachusetts cases in which secondary evidence was admitted to prove the terms of a document that was "lost with no serious fault of its proponent." This is a common law exception to the Best Evidence Rule which has been adopted by the Massachusetts courts. The Massachusetts Supreme Judicial Court has stated, however, that where Article 3 specifically governs a situation, it "trumps" any common law default rule. Further, misplaced evidenced is not grounds for reconsideration or a new trial and/or relief from judgment under Rule 60(b), where, as here, the creditor did not exercise due diligence in trying to locate it prior to the trial. Creditor admitted that he had not looked for the note in the part of the building where it was eventually located, a building owned by the creditor. It was not "newly discovered evidence" as newly discovered evidence refers to "evidence of fact in existence at the time of trial of which the aggrieved party was excusably ignorant. The burden of showing that the evidence could not have been discovered by the exercise of due diligence falls upon the movant, which failed here.

Coffin v. ECAST Settlement Corp., 2010 Bankr. Lexis 2964 (BAP 1st Cir. 9/15/10)(Before Judges Lamoutte, Boroff and Rosenthal [retired], Opinion by Judge Lamoutte).

Debtor appealed the Bankruptcy Court's order to the Bankruptcy Appellate Panel, challenging the Bankruptcy Court's denying confirmation of his Chapter 13 plan because it included a deduction for an ownership expense on a vehicle that was neither leased nor encumbered. Panel reversed and remanded for proceedings consistent with the Panel's opinion. The Bankruptcy Court had erroneously concluded as a matter of statutory interpretation that under Section 707(b)(2)(A)(ii)(I), the vehicle ownership expense deduction is not "applicable" to above-median debtors who have no loan or lease payments, and that the Debtor had therefore failed to apply all of his disposable income to make payments to unsecured creditors as required by Section 1325(b)(1)(B). Panel opined that the mandatory language of 707(b)(2)(A)(ii)(I), read in the context of its statutory scheme, purposes, and policies, provides that above-median debtors "shall" enter the Internal Revenue Service Local Standards (rather than their actual

expenses) onto their Form B22C in determining their projected net disposable income. For this reason, the Panel reversed. This was an interlocutory appeal as denial of confirmation is not a final order.

Calderon v. Citimortgage, Inc., 2010 U.S. Dist. Lexis 105912 (D. P.R. 9/27/10)(Daniel R. Dominguez, District Judge).
Debtors unsuccessfully appealed to the District Court the Bankruptcy Court's denial of reconsideration from the Order finding the Bankruptcy Court lacked jurisdiction to entertain their objection to a creditor's claim, the objection being filed four months after the Chapter 11 reorganization plan was confirmed. The creditor properly asserted that challenge to its claim was barred on the grounds that the Bankruptcy Court lacked jurisdiction to hear the objection under the *res judicata* doctrine, and that the objection was time barred under the provisions of the confirmed Chapter 11 plan. Plan confirmation is a final order, with *res judicata* effect, and is imbued with the strong policy favoring finality. The confirmed plan provisions stated that the debtors could file an objection to any claim within 30 days before the confirmation hearing date and thereafter be deemed waived. 11 U.S.C. Section 1141(a) provides that the terms of the confirmed plan bind the debtor and creditors.

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VICTOR ORTEGA CALDERON, DANA L. ACOSTA QUINONES, Appellant(s), v. CITIMORTGAGE, INC., Appellee(s).

Civil No. 09-1414 (DRD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

2010 U.S. Dist. LEXIS 105912

September 27, 2010, Decided
September 27, 2010, Filed

CORE TERMS: debtor-appellant, confirmation, confirming, res judicata, designation, res judicata, jurisdiction to entertain, proof of claim, confirmed, final order, reorganization, clerk, conclusions of law, bankruptcy proceedings, unappealable, litigated, finality, mortgage, notice, general partner, post-confirmation, jurisdictional, designated, contest, corresponding, de novo, clear error, abuse of discretion standard, subject matter, citations omitted

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For U.S. Trustee Office, Trustee: Monsita Lecaroz-Arribas, LEAD ATTORNEY, U. S. Trustee Office, San Juan, PR.

JUDGES: DANIEL R. DOMINGUEZ, U.S. DISTRICT JUDGE.

OPINION BY: DANIEL R. DOMINGUEZ

OPINION

ORDER DISMISSING APPEAL

Pending before the Court is an appeal filed by debtors-appellants Víctor Ortega Calderón ("Ortega") and Dana L. Acosta Quiñones ("Acosta" or collectively "Appellants"), against creditor CitiMortgage, Inc. ("CMI"), wherein the appellants challenge the *Opinion and Order* entered by the Hon. Brian K. Tester, on April 6, 2009, in **Bankruptcy** Case No. 02-7934 (BKT), Docket No. 556, denying appellants' reconsideration request from an *Order* entered on March 3, 2009, Docket No. 552, finding that the **bankruptcy** court lacked jurisdiction to entertain appellants' untimely objection to claim. Debtors-appellants' objection to claim was filed almost four months after the **bankruptcy** court had entered an order confirming their proposed plan of reorganization.[1] **[*2]** CMI opposed the objection to claim on the grounds that, the **bankruptcy** court lacked jurisdiction to entertain the objection under the *res judicata* doctrine, and the objection is time barred under the provisions of the Chapter 11 confirmed plan. For the reasons set forth below, the instant appeal is dismissed with prejudice, and the *Opinion and Order* of April 6, 2009 entered by the **bankruptcy** court is affirmed.

FOOTNOTES

1 The *Order Confirming Plan* was entered on September 12, 2007 (**Bankruptcy** Case No. 02-7934, Docket No. 439), and the debtors-appellants' *Objection to Claim No. 3* was filed on January 8, 2008 (**Bankruptcy** Case No. 02-7934, Docket No. 451).

Jurisdiction

This Court has jurisdiction to entertain bankruptcyappeals pursuant to 28 U.S.C. § 158(a)(1).

Standard of Review

On appeal, the district court reviews rulings of law *de novo* and findings of fact for clear error. *Prebor v. Collins (In re I don't Trust)* 143 F.3d 1, 3 (1st Cir. 1998); *Jeffrey v. Desmond,* 70 F.3d 183, 185 (1st Cir. 1995). "Under an abuse of discretion standard, a reviewing court cannot reverse unless it has a 'definite and firm conviction that the court below committed a clear error of judgment' in the conclusion it reached **[*3]** upon a weighing of the relevant factors." *In re Hosseinpour Esfahani, et al. v. Hosseinpor-Esfahani,* 198 B.R. 574, 577 (9th Cir. 1996), citing *Marchand v. Mercy Medical Ctr.,* 22 F.3d 933, 936 (9th Cir. 1994). "Evidentiary rulings by the **bankruptcy** court are subject to the 'abuse of discretion' standard." *Williamson v. Busconi,* 87 F.3d 602, 603, n. 4 (1st Cir. 1996), citing *United States v. Cotto-Aponte,* 30 F.3d 4, 6 (1st Cir. 1994).

"The standard of review on this appeal requires that we respect, unless 'clearly erroneous,' all findings of fact by the **bankruptcy** court, which includes any finding of actual reliance and any raw fact findings pertinent to the issue of justifiable reliance. *Brandt v. Repco Printers & Lithographics, Inc.,* 132 F.3d 104, 107-08 (1st Cir. 1997)." *In re Spadoni,* 316 F.3d 56, 58 (1st Cir. 2003). "A court reviewing a decision of the **bankruptcy** court may not set aside findings of fact unless they are clearly erroneous, giving 'due regard ... to the opportunity of the **bankruptcy** court to judgethe credibilityof the witnesses. (Citations omitted)." *Palmacci v. Umpierrez,* 121 F.3d 781, 785 (1st Cir. 1997).

"A finding of fact is clearly erroneous, although there is evidence **[*4]** to support it, when the reviewing court, after carefully examining all the evidence, is 'left with the definite and firm conviction that a mistake has been committed.'" *Palmacci,* 121 F.3d at 785, citing *Anderson v. City of Bessemer City,* 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). "Deference to the **bankruptcy** court's factual findings is particularlyappropriate on the intent issue '[b]ecause a determination concerning fraudulent intent depends largely upon an assessment of the credibility and demeanor of the debtor.'" *Id.* citing *In re Burgess,* 955 F.2d 134, 137 (1st Cir. 1992). "Particular deference is also due to the trial court's findings that depend on the credibility of other witnesses and on the weight to be accorded to such testimony." *Id.* citing Fed.R.Bank.R. 8013; *Keller v. United States,* 38 F.3d 16, 25 (1st Cir. 1994).

Moreover, when the parties do not contest the findings of fact made by the **bankruptcy** court, the appeals court will not disturb them. *In re Joelson,* 427 F.3d 700, 702 (1st Cir. 2005) ("Becausethe parties do not specifically contest the **bankruptcy** court's findings of

fact, the court will not disturb this ruling on appeal"), citing *Jenkins v. Hodes (In re Hodes),* 287 B.R. 561, 570 (D.Kan. 2002), **[*5]** *aff'd,* 402 F.3d 1005 (10th Cir. 2005).

In the instant appeal, the appellants only contest the conclusions of law made by the **bankruptcy** court, specifically the lack of jurisdiction to entertain the objection to claim based on the *res judicata* doctrine. *See Appellants' Brief,* Docket No. 4, pages 3-4.

Issues

The questions before the Court are: (a) whether the **bankruptcy** court erred "when it determined that it lacked jurisdiction based on the doctrine of *res judicata* to consider an objection to a fraudulent claim;" and (b) whether the **bankruptcy** erred "when it determined that the fraud, miscarriage of justice and public policy exceptions to the *res judicata* doctrine were inapplicable to the facts of the case." *See Appellants' Brief,* Docket No. 4, pages 3-4.

Factual and Procedural Background

The facts in the instant caseareuncontested. The debtors-appellants filed for voluntaryrelief under Chapter 11 of the **Bankruptcy** Code on July 26, 2002. On August 20, 2002, CMI filed its proof of claim, as a secured creditor, in the amount of $133,732.94 ("Claim No. 3").[2] Debtors-appellants were $9,054.17 in arrears, at the time of the filing of CMI's proof of claim. *See Appellee's Brief,* Docket No. 5, page **[*6]** 6. According to CMI's proof of claim, the loan was executed on April 20, 1990; it is secured with debtors-appellants' realty, and the payment term of the loan is 360 months. *See Appellee's Brief,* Docket No. 5, pages 6-7. CMI alleges that the debtors-appellants did not object to CMI's claim at the time it was filed. *See Appellee's Brief,* Docket No. 5, page 8.

FOOTNOTES

2 The Court notes that Rule 3001(f) of the Federal Rules of **Bankruptcy** Procedure ("Fed.R.Bankr.P.") provides: "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." "Under this rule, a claim is presumed valid until an objecting party has introduced evidence sufficient to rebut the claimant's prima facie case." *In re Fili,* 257 B.R. 370, 372 (1 st Cir. BAP 2001) , *citing* *In re Inter-Island Vessel Co.,* 98 B.R. 606, 608 (Bankr.D.Mass.1988) . "A proof of claim will prevail over a mere formal objection." *Id. (citations omitted).* "Plan confirmation is a final order, with *res judicata* effect, and is imbued with the strong policy favoring finality." *Id.* at p. 373 .

CMI further argues that during the course of the proceedings they filed two motions for **[*7]** relief from stay due to the debtors-appellants' failure to make the post-petition mortgage payments as agreed. The record shows that the CMI's motions for relief were filed on June 9, 2003 and July 9, 2007, *see* **Bankruptcy** Case No. 02-7934, Docket entries No.

72 and 407. *See Appellee's Brief,* Docket No. 5, page 7. The June 9, 2003 motion had a statement of account which disclosed the date of maturity of the loan, which is May 1, 2020. *See Appellee's Brief,* Docket No. 5, page 7. The July 9, 2007 motion for relief had a copy of the mortgage note attached, which states that the loan was "due and payable on May 1, 2020." *See Appellee's Brief,* Docket No. 5, page 7, and Exhibit I, Docket No. 5-2, page 4. CMI alleges that the debtors-appellants answered the motion for relief, but failed to "raise any questions as to the term of the note or its validity," at that stage of the proceedings. *See Appellee's Brief,* Docket No. 5, page 7.

The BankruptcyCourt record shows that the debtors-appellants filed the disclosure statement and the proposed reorganization plan on January 20, 2006, *see* **Bankruptcy** Case No. 02-7934, Docket entries No. 274 and 275. The plan was confirmed on September 12, 2007, *see* **[*8] Bankruptcy** Case No. 02-7934, Docket No. 439. The Court makes reference to the following provisions of the confirmed plan, which are applicable to the issues on appeal:
a. Article I, ¶ 23, provides: DEFINITIONS

"*Effective Date*" shall mean Sixty (60) [days] after the Confirmation Date, and shall be the date on which there shall be made all initial cash payments required by the Plan.

"*Final Order*" shall mean an Order of the **Bankruptcy** Court (or other court of appropriate jurisdiction) which has not been reversed, stayed, modified or amended and the time to appeal from or to seek review or rehearing of such order shall have expired, and as to which no appeal or petition for review or rehearing or certiorari proceeding is pending, as a result of which such Order shall have become final in accordance with Rule 8002 of the Rules of **Bankruptcy** Procedure, as such Rule may be amended from time to time; provided, however, that the possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the **Bankruptcy** Rules, may be filed with respect to such order shall not cause such order not to be a Final Order.

b. Article VII provides: OBJECTIONS **[*9]** TO CLAIMS

The Debtors, at their option, or upon order of the **Bankruptcy** Court if requested, **may file an objection to any claim as to its validity or amount within 30 days before the Confirmation Hearing Date. Objections not filed within such time period shall be deemed waived.** If an objection is made, payment to such claimants will be made only after the entry of a final order by the Court allowing such claim in accordance with the provisions of the Plan governing such Class to which such claims belongs.

c. Article XIII provides: RELEASE AND DISCHARGE OF CLAIMS

13.1 Discharge. . . .

13.2 Injunction Relating to the Plan. As of the Effective Date, all Persons are hereby permanently enjoined from commencing or continuing, in any manner or in any place, any action or other proceeding, whether directly, indirectly, derivatively or otherwise against the Debtors, ILYLI [debtor I Love You Lord Home Center, Inc., **Bankruptcy** Case No. 05-12869 (BKT)] and/or their Estate, on account of, or respecting any Claims, debts, rights, Causes of Action or liabilities discharged pursuant to the Plan, except to the extent expressly permitted under the Plan.

13.3 Setoffs. . . .

d. Article XV: OTHER PROVISIONS

The **[*10]** Plan shall become effective upon the Effective Date of the Plan, which is sixty days (60) after the order confirming the plan, becomes a Final Order. (Emphasis ours). *See* **Bankruptcy** Case No. 02-7934, Docket No. 439.

As stated above, the BankruptcyCourt confirmed the Plan, on September 12, 2007, *see Order Confirming Plan,* **Bankruptcy** Case No. 02-7934, Docket No. 439 (hereinafter "*Order Confirming Plan*"). Hence, the *Order Confirming Plan* became final and unappealable sixty(60) days thereafter, that is, November 11, 2007. *See Opinion and Order,* **Bankruptcy** Case No. 02-7934, Docket No. 556, page 1.

The BankruptcyCourt further held that the debtors-appellants failed to object to CMI's claim, at the hearing on confirmation of the plan. "The debtor had ample knowledge and opportunity to litigate this particular claim prior to the order confirming plan becoming final, yet failed to do so." *See Opinion and Order,* **Bankruptcy** Case No. 02-7934, Docket No. 556, pages 3-4.

On January 8, 2008, the debtors-appellants filed a tardy objection to CMI's claim number 3, "arguing for the first time since the petition was filed that the note was for a 20 year period as opposed to a 30 year period." *See Appellees'* **[*11]** *Brief,* Docket No. 5, page. 8. CMI replied to the debtors-appellants' objection to claim on February 25, 2008. *See Appellees' Brief,* Docket No. 5, page. 8. A payoff balance of the loan was issued on March 31, 2008 to the debtors-appellants, in the amount of the $126,776.20 payable as of April 30, 2008. *See Appellees' Brief,* Docket No. 5, page. 8. The debtors-appellants' residence, which was the security of CMI's loan, was sold on April 7, 2008 to a third party in the amount of $300,000.00. *See Appellees' Brief,* Docket No. 5, page. 8.

On April 30, 2008, the **Bankruptcy** Court ordered the debtors-appellants to deposit the proceeds of the sale with the Clerk of the Court until the controversy between the debtors-appellants and CMI was resolved. *See* **Bankruptcy** Case No. 02-7934, Docket No. 473. On May 12, 2008, the **Bankruptcy** Court ordered CMI to deposit the amount of $126,776.20 corresponding to the proceeds of the sale, with the Clerk of the Court. *See* **Bankruptcy** Case No. 02-7934, Docket No. 477, and *Appellees' Brief,* Docket No. 5, page. 8. CMI consigned the corresponding funds on June 2, 2008. *See* **Bankruptcy** Case No. 02-7934, Docket No. 493, and *Appellees' Brief,* Docket No. 5, page. 8.

Thereafter, **[*12]** the **Bankruptcy** Court ordered the parties to file legal memoranda "as to the jurisdictional issue of the ability to file an objection to claim after the confirmation of the plan." *See Appellees' Brief,* Docket No. 5, page. 8. On March 3, 2009, the **Bankruptcy** Court held a hearing on the jurisdictional issue only, and determined that the **Bankruptcy** Court lacked jurisdiction to entertain the debtors-appellants' objection to CMI's claim based on the doctrine of *res judicata. See* **Bankruptcy** Case No. 02-7934, Docket No. 544, *Minutes* of the March 3, 2009 hearing, and Docket No. 552, Transcript of the Proceedings held on March 3, 2009, page 32:
THE COURT: As to the merits of the objection itself, no, I have not made any determination as to the merits. My ruling is that based on my review of the documents, the docket, and the relevant case law, we do not have jurisdiction to entertain the objection to the proof of claim, as I stated on the record already. And that's our ruling. And the objection to the proof of claim would be denied based on the lack of jurisdiction of the Court.

On March 6, 2009, the debtors-appellants moved the **Bankruptcy** Court to reconsider its

Order of March 3, 2009, and on **[*13]** April 6, 2009, the **Bankruptcy** Court denied the reconsideration request through an *Opinion and Order,* which is now subject of this appeal. "[T]his Court concluded at the March 3, 2009 hearing, that the *res judicata* effect of the confirmation order divested this Court of jurisdiction over any matter regarding a claim dispute." *See* **Bankruptcy** Case No. 02-7934, Docket No. 556, page 3, and *Appellees' Brief,* Docket No. 5, page. 9.

Applicable Law and Discussion

Section 1141(a) of the **Bankruptcy** Code provides:
Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, anyentityacquiring propertyunder the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equitysecurityholder, or general partner has accepted the plan.

It is has long been settled that an order confirming a plan is to be given *res judicata* effect. *See* *Stoll v. Gottlieb,* 305 U.S. 165, 170, 59 S. Ct. 134, 83 L. Ed. 104 (1938). In *Stoll,* the Court held:
But where the judgment **[*14]** or decree of the Federal court determines a right under a Federal statute, that decision is "final until reversed in an appellate court, or modified or set aside in the court of its rendition." As this plea was based upon an adjudication under the reorganization provisions of the **Bankruptcy** Act, effect as *res judicata* is to be given the Federal order, if it is concluded it was an effective judgment in the court of its rendition. *See also* *Monarch Life Insurance Company, et al. v. Ropes & Gray,* 65 F.3d 973, 978-979 (1 Cir.1995); *In re Space Building Corporation,* 206 B.R. 269, 272-273 (D.Mass.1996) ("The Order of Confirmation of the **Bankruptcy** Court has binding effect and is *res judicata*" ... "Because of its *res judicata* effect, a confirmed Plan is not vulnerable to collateral attack"), as well as the collection of cases cited therein; *In re Romero,* 411 B.R. 56, 60 (Bankr.D.Mass. 2009) ("Ordinarily principles of *res judicata* prevent a subsequent attack on the confirmation of a plan," (citations omitted)); *In re Diberto,* 171 B.R. 461, 471-472 (Bankr.D.N.H. 1994) ("Application of the doctrine of *res judicata* to the confirmation order supports the strong policy of finality in the reorganization **[*15]** process").

In the instant case, the *Opinion and Order* on appeal is based on the **bankruptcy** court's lack of jurisdiction which is grounded in the doctrine of *res judicata.* This Court reviews *de novo* the conclusions of law of the **bankruptcy** court. *In re Colonial Mortgage Bankers Corp.,* 324 F.3d 12, 16 (1st Cir. 2003); *In re High Voltage Engineering Corporation, et al.,* 544 F.3d 315, 318 (1st Cir. 2008); *Monarch Life Insurance Company, et al. v. Ropes & Gray,* 65 F.3d at 978-979.

In *Colonial Mortgage,* 324 F.3d at 16 and 20, the Court held:
Federal law determines whether an earlier judgment, rendered in a federal court, bars the maintenance of a subsequent federal court action. *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 142 F.3d 26, 37 (1st Cir. 1998). Under federal law, "a final judgmenton the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry,* 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980). Thus, the elements of a *res judicata* defense are (1) a final judgment on the merits in an earlier proceeding, (2) sufficient identicality between the causes of action asserted in the earlier and later suits, and (3) **[*16]** sufficient identicality between the parties in the two actions. *Gonzalez v. Banco Cent. Corp.,* 27 F.3d 751, 755

(1st Cir. 1994).

. . .

Because *res judicata* bars not only those theories that are actually litigated on the earlier action but also those theories that could have been litigated herein, *see* McCurry, 449 U.S. at 94, *Mass. Sch. Of Law*, 142 F.3d at 39, ...

It is well settled, that a party cannot play "fast and loose with the courts" to advance its own interest, particularly if the cause of action now raised could have been raised before during the pendency of the **bankruptcy** proceedings, such as, the time when the proof of claim was filed; the confirmation of the plan; the period to file objections prior to the confirmation of the plan, or when CMI twice moved for relief from stay during the **bankruptcy** proceedings. *See Patriot Cinemas, Inc. v. Gen. Cinema Corp.*, 834 F.2d 208, 212 (1 st Cir. 1987); *Payless Wholesale Distributors, Inc., et al.* 989 F.2d 570, 571 (1st Cir. 1993).

In its legal analysis, the **Bankruptcy** Court held that it was divested of jurisdiction after the order confirming plan became final and unappealable. *See Opinion and Order* of April 6, 2009, **Bankruptcy** Case **[*17]** No. 02-7934, Docket No.556. "Whatever claims were distinctly put at issue in the proceeding for confirmation of a Chapter 11 plan and determined bythe **bankruptcy** court are forever barred by the confirmation order and cannot be collaterally attacked in a subsequent suit between parties to the confirmation proceeding and their privies – so long as the confirmation order itself remains unmodified." *Id.* at page 2. We agree, and briefly explain.

In *Rederford v. US Airways, Inc.*, 589 F.3d 30 36 (1st Cir. 2009), the Court emphasized the purpose of finality of the order confirming a chapter 11 plan. The Court held:
Another purpose, especially in Chapter 11 proceedings, is to provide finality at the end of the **bankruptcy** proceeding for the debtor. Chapter 11 reorganization provides debtors with a fresh start by adjudicating, disallowing, or discharging all claims arising before the debtor is discharged from **bankruptcy.** *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 363-364, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006); *Mason v. Official Comm. Of Unsecured Creditors*, 330 F.3d 36, 41 (1st Cir. 2003); 1 Alan N. Resnick et al., *supra,* ¶ 1.01[1], at 1-4. If equitable claims that are reduceable to payment arising before the debtor's discharge **[*18]** from **bankruptcy** could be raised later, debtors would be less certain about the effect of their **bankruptcy** discharge and this would hamper their efforts to reorganize into profitable business.

In the instant case, the **Bankruptcy** Court held that it lacked jurisdiction to entertain the belated post-confirmation objection filed the debtors-appellants, as the order confirming the Plan was *res judicata.* The **bankruptcy** court based its decision on the provisions of Section 1141 of the **Bankruptcy** Code, as well as the provisions of debtors-appellants' confirmed plan. It is settled that an *Order Confirming Plan* is final and unappealable, if the parties in interest failed to take a timely appeal. In the instant case, the record shows that the debtors-appellants failed to request a modification of the plan or to timely appeal the *Order Confirming Plan,* hence, the effect of the *Order Confirming Plan* became *res judicata.*

Although the **Bankruptcy** Court declined to make a determination on the merits of the debtors-appellants' post-confirmation objection as to the validity of the *Note* and the *First Mortgage* executed by the debtors-appellants and CMI, the Court agrees that it was an issue

that was "or could **[*19]** have been raised" and litigated prior to the confirmation of the plan, and hence, the subject matter is now totally barred. *Colonial Mortgage,* 324 F.3d at 16, *citing* *Allen v. McCurry,* 449 U.S. at 94. *See also* *Stoll,* 305 U.S. at 171-172:

A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators . . . Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter . . . After a Federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact.

In *Colonial Mortgage,* 324 F.3d at 19, the Court further held that, "[a]fter a party has litigated and lost, the doctrine of *res judicata* precludes any attempt on its part, the second time around, to supplement the evidentiary record." *See also* *In re Space Building Corporation,* 206 B.R. at 273, "[b]ecause of its *res judicata* effect, a confirmed Plan is not vulnerable to collateral effect."

In view of the foregoing, the Court finds that the *Order* **[*20]** *Confirming Plan* is final and unappealable, and it is given the effect of *res judicata.* Hence, since the *Order Confirming Plan* is final, and the Court has no jurisdiction to entertain the belated post-confirmation objection filed by the debtors-appellants. The Court notes that the core of the debtors-appellants' objection is an issue that the debtors-appellants had almost five years to raise it and litigate during the course of the **bankruptcy** proceedings, as provided by the **Bankruptcy** Code and the Federal Rules of **Bankruptcy** Procedure. To rule otherwise will defeat the purpose of the provisions of the **Bankruptcy** Code, as well as the procedural rules. Aside from the fact that it will be prejudicial to the other creditors, and parties in interest.

In view of the foregoing, the Court incorporates the conclusions of law reached by the **bankruptcy** court in the April 6, 2009 *Opinion and Order,* **Bankruptcy** Case No. 02-7934, Docket No.556.

A Final Note

The appellants filed a *Motion To Strike Exhibits Included In Appellee's Brief,* Docket No. 6, on the ground that the appellee failed to file a designation of items on appeal to include the additional documents not included in the appellants' designation **[*21]** of items, as provided by Fed.R.Bankr.P. 8006 .[3] The Court notes that Fed.R.Bankr.P. 8006 provides that the appellant is statutorily obligated to file the designation of items, and that failure to comply may entail the dismissal of the appeal. As opposed to the appellee "may file" a designation of items after the appellant's service of its designation of items.

FOOTNOTES

[3] Fed.R.Bankr.P. 8006 provides:

Within 14 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the **appellant shall file** with the clerk and serve on the appellee a designation of the

items to be included in the record on appeal and a statement of the issues to be presented. Within 14 days after the service of the appellant's statement the **appellee may file** and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items **[*22]** to be included in the record. . . . The record on appeal shall include the items so designated, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. . . . (Emphasis supplied).

After a review of the record, the Court notes that the designation of items on appeal was filed by the appellants, as provided by Fed.R.Bankr.P. 8006. However, the Court finds that the appellants also failed to include documents from the **bankruptcy** record that were necessary to assist the Court to entertain this appeal. By including a copy of the docket of the **bankruptcy** record, the district court may make its own determination as to the content of the record on appeal. It is settled that the appeals court may take judicial notice of the underlying **bankruptcy** record. *See* *In re Colonial Mortgage Bankers Corp.,* 324 F.3d at 15; *In re E.R. Fegert, Inc.,* 887 F.2d 955, 957-958 (9th Cir. 1989), citing *Wilson v. Huffman (In re Missionary Baptist Foundation of America),* 712 F.2d 206, 211 (5 th Cir. 1983); **[*23]** *Berge v. Sweet (In re Berge),* 37 B.R. 705, 708 (W.D. Wis. 1983). "[J]ustice is better served when controversies are decided on theirmerits rather than on procedural technicalities." *In re Bienert,* 48 B.R. 326, 327 (N.D.Iowa 1985). *See also* *In re Bulic,* 997 F.2d 299, 301-302 (7th Cir. 1993) (the standards to be followed by the courts when the appellants failed to file the designation of items on appeal within the time provided by Fed.R.Bankr.P. 8006).

In any event, a review of the appellants' designated items include the *Note,* as well as the *First Mortgage Deed,* executed by the lender and debtor-appellant Dana Luz Acosta Quiñones. *See Designation Of Items To Be Included In The Record On Appeal,* **Bankruptcy** Case No. 02-7934. The motions for relief from stay and the corresponding oppositions, are part of the **bankruptcy** record, as well as CMI's motion in limine and the opposition thereto. Hence, the Court has taken judicial notice of the underlying **bankruptcy** record.

In view of the foregoing, the appellants' request to strike the exhibits included with the appellee's brief, Docket No. 6, is noted and denied.

Conclusion

For the reasons set forth above, the *Opinion and Order* entered by the **bankruptcy** **[*24]** court on April 6, 2009, **Bankruptcy** Case No. 02-7934, Docket No. 556, is affirmed, and the instant **bankruptcy** appeal is dismissed with prejudice. The appellants' request to strike the exhibits included with the appellee's brief, Docket No. 6, is noted and denied. Judgment will be entered accordingly.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 27th day of September, 2010.

/s/ Daniel R. Domínguez

DANIEL R. DOMINGUEZ

U.S. DISTRICT JUDGE

RONEY HARRIS, Appellant v. HSBC BANK USA, N.A., as Trustee, Appellee

C.A. NO. 09-cv-30215-MAP

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 102726

September 28, 2010, Decided
September 28, 2010, Filed

PRIOR HISTORY: Harris v. HSBC Bank USA (In re Harris), 2009 Bankr. LEXIS 3387 (Bankr. D. Mass., Oct. 15, 2009)

CASE SUMMARY

PROCEDURAL POSTURE: Appellant debtor sought review of the **bankruptcy** court's decision denying the debtor's motion to reconsider an earlier order dismissing his adversary proceeding and lifting the automatic **bankruptcy** stay. The debtor also sought leave to appeal.

OVERVIEW: After the debtor executed a promissory note that was payable to a lender, the debtor filed for **bankruptcy.** Alleging that the note had been transferred to it by assignment, appellee creditor filed a motion for relief from the automatic **bankruptcy** stay. Subsequently, the court dismissed the debtor's first adversary proceeding, the creditor withdrew its first motion for relief from the automatic stay, and the court granted the creditor's second motion for relief from the automatic stay. The debtor argued that the creditor lacked standing to bring a foreclosure action because the creditor could not show that it was ever assigned the note. If the creditor could not plausibly explain how it was assigned the note, then the creditor had no right to enforce the note, no standing to foreclose on the mortgaged property, and no colorable claim to the estate property. Because the creditor had not yet proven or explained how it acquired the note, the court held that the creditor had not demonstrated a colorable claim to the estate property. The debtor was entitled to have the **bankruptcy** court address his argument that the creditor

could not prove that the note had been assigned to it.

OUTCOME: The court denied as moot the debtor's leave to appeal, reversed the **bankruptcy** court's decision denying the debtor's motion to reconsider, and remanded the matter for further proceedings.

CORE TERMS: reconsideration, adversary proceeding, lift-stay, mortgage, automatic stay, assigned, holder, foreclose, lifting, notice, timely filed, colorable claim, transferee, bankruptcy proceeding, reconsider, order denying reconsideration, pro se, issue preclusion, appealable, automatic, moot, estate property, transferred, assignee, lift, error of law, standing to bring, actually litigated, foreclosure action, negotiation

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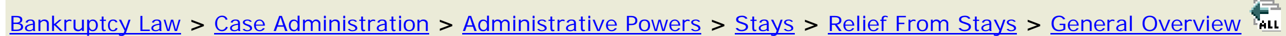
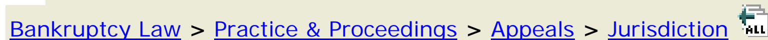
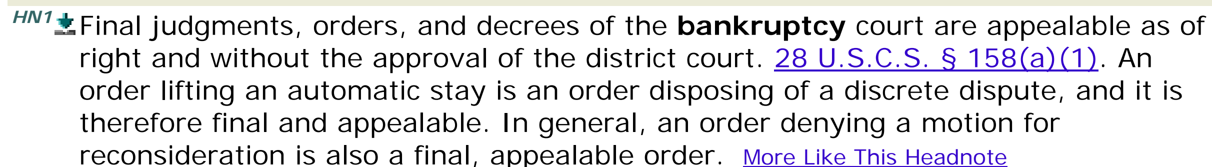


Bankruptcy Law > Case Administration > Administrative Powers > Stays > Relief From Stays > General Overview



Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

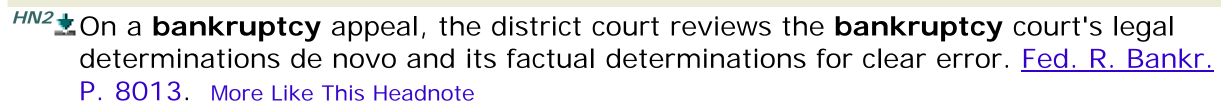
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend



HN1 Final judgments, orders, and decrees of the **bankruptcy** court are appealable as of right and without the approval of the district court. 28 U.S.C.S. § 158(a)(1). An order lifting an automatic stay is an order disposing of a discrete dispute, and it is therefore final and appealable. In general, an order denying a motion for reconsideration is also a final, appealable order. More Like This Headnote

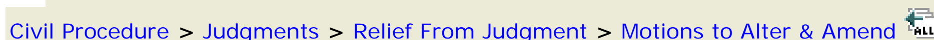
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

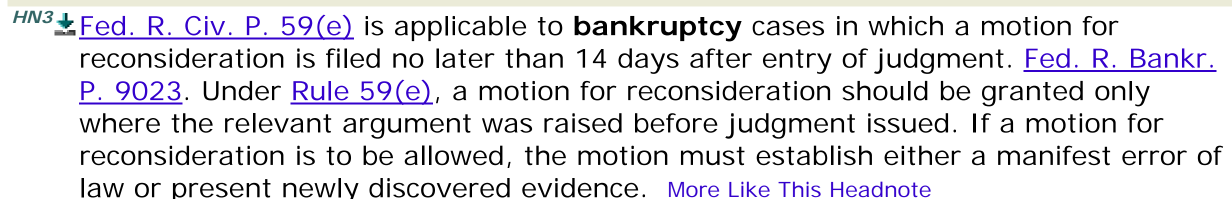


HN2 On a **bankruptcy** appeal, the district court reviews the **bankruptcy** court's legal determinations de novo and its factual determinations for clear error. Fed. R. Bankr. P. 8013. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview



Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

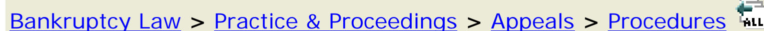


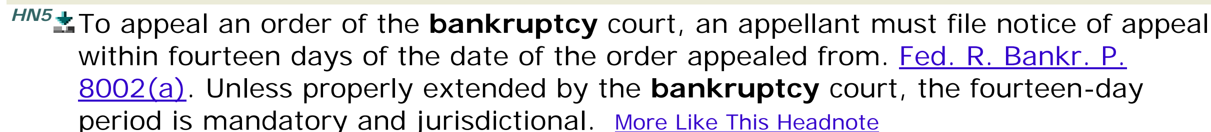
HN3 Fed. R. Civ. P. 59(e) is applicable to **bankruptcy** cases in which a motion for reconsideration is filed no later than 14 days after entry of judgment. Fed. R. Bankr. P. 9023. Under Rule 59(e), a motion for reconsideration should be granted only where the relevant argument was raised before judgment issued. If a motion for reconsideration is to be allowed, the motion must establish either a manifest error of law or present newly discovered evidence. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

HN4 A motion for reconsideration is reviewed for abuse of discretion. This standard applies to orders by the **bankruptcy** court. More Like This Headnote

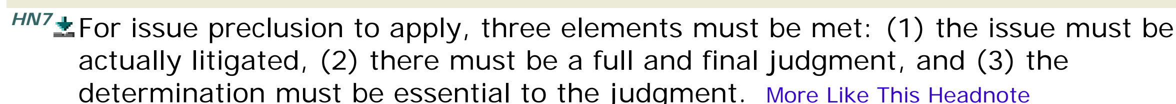

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures


HN5 To appeal an order of the **bankruptcy** court, an appellant must file notice of appeal within fourteen days of the date of the order appealed from. Fed. R. Bankr. P. 8002(a). Unless properly extended by the **bankruptcy** court, the fourteen-day period is mandatory and jurisdictional. More Like This Headnote

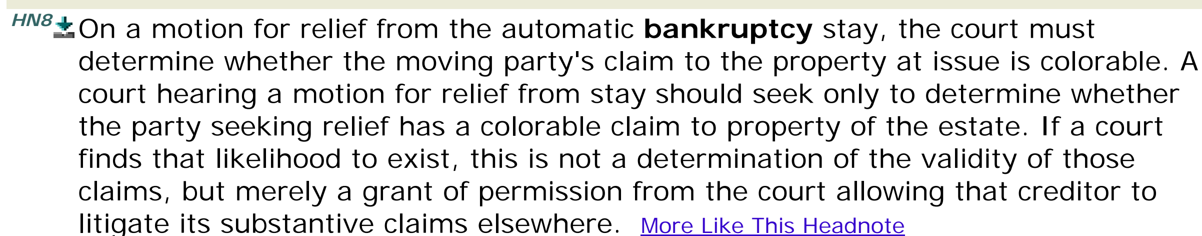
Civil Procedure > Parties > Self-Representation > Pleading Standards

HN6 Pro se filings are held to a less stringent procedural standard than others. More Like This Headnote

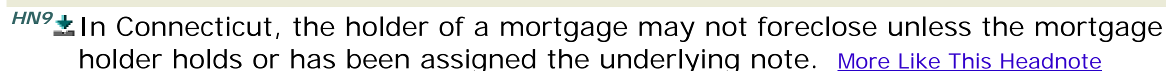
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel


HN7 For issue preclusion to apply, three elements must be met: (1) the issue must be actually litigated, (2) there must be a full and final judgment, and (3) the determination must be essential to the judgment. More Like This Headnote

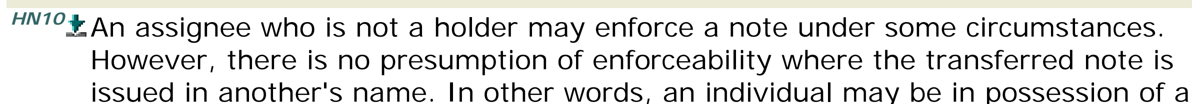
Bankruptcy Law > Case Administration > Administrative Powers > Stays > Relief From Stays > General Overview


HN8 On a motion for relief from the automatic **bankruptcy** stay, the court must determine whether the moving party's claim to the property at issue is colorable. A court hearing a motion for relief from stay should seek only to determine whether the party seeking relief has a colorable claim to property of the estate. If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere. More Like This Headnote

Real Property Law > Financing > Mortgages & Other Security Instruments > Foreclosures > General Overview


HN9 In Connecticut, the holder of a mortgage may not foreclose unless the mortgage holder holds or has been assigned the underlying note. More Like This Headnote

Real Property Law > Financing > Mortgages & Other Security Instruments > Transfers > Transfers by Mortgagees


HN10 An assignee who is not a holder may enforce a note under some circumstances. However, there is no presumption of enforceability where the transferred note is issued in another's name. In other words, an individual may be in possession of a

note payable by its terms to some third party, but mere possession does not entitle the individual to collect on the note. The individual has to provide some proof of how the note was acquired. More Like This Headnote

COUNSEL: **[*1]** Roney Harris, Appellant, Pro se, Springfield, MA.

HSBC Bank USA, National Association, as Trustee Ubder the Pooling and Servicing Agreement Dated as of May 1, 2006, Appellee, Pro se, Dallas, TX.

For HSBC Bank USA, National Association, as Trustee Ubder the Pooling and Servicing Agreement Dated as of May 1, 2006, Mortgage Electronic Registration Systems, Inc., as Nominee for Fremont Investment & Loan, Litton Loan Servicing LP, Appellees: Richard E. Briansky, LEAD ATTORNEY, Joseph P. Calandrelli, Prince, Lobel, Glovsky & Tye LLP, Boston, MA.

Fremont Home Loan Trust 2006-A, Appellee, Pro se, Dallas, TX.

Fremont Investment & Loan, Appellee, Pro se, Dallas, TX.

Mortgage Electronic Registration Systems, Inc., as Nominee for Fremont Investment & Loan, Appellee, Pro se, Flint, MI.

Litton Loan Servicing LP, Appellee, Pro se, Houston, TX.

JUDGES: MICHAEL A. PONSOR, U. S. District Judge.

OPINION BY: MICHAEL A. PONSOR

OPINION

MEMORANDUM AND ORDER REGARDING **BANKRUPTCY** APPEAL AND MOTION FOR LEAVE TO APPEAL

(Dkt. No. 3)

PONSOR, D.J.

I. INTRODUCTION

This **bankruptcy** appeal provides an example of how much confusion can ensue when a pro se litigant gets lost in a procedural ball of yarn. Being now in the position to untangle the snarl (to some **[*2]** extent), the court as a matter of prudence will remand the case to the very patient **bankruptcy** judge to insure the Appellant's rights are not lost as a result of his own inexperience.

Pro Se Appellant Roney Harris ("Harris" or "Appellant") has appealed the **Bankruptcy** Court's decision of November 9, 2009, denying his Motion to Reconsider an earlier order dismissing his adversary proceeding and lifting the automatic stay. He also seeks leave to appeal. (Dkt. No. 3.) For the reasons stated below, the rulings of the **Bankruptcy** Court will be remanded for further consideration, and the Motion for Leave to Appeal will be denied as moot.

II. FACTS AND PROCEDURAL BACKGROUND

In February 2006, Harris executed a note (the "Note") and received a loan from Fremont Investment & Loan ("Fremont"). To secure the loan, he signed a mortgage agreement (the "Mortgage") on property located at 83 Greentree Drive, Glastonbury, Connecticut (the "Property") to Mortgage Electronic Registration Systems, Inc. ("MERS"), in its capacity as nominee for Fremont.

About two and a half years later, in July 2008, Harris filed for **bankruptcy** under Chapter 7. In June 2008 and then again in October 2008, MERS allegedly assigned **[*3]** to HSBC Bank USA, N.A. ("HSBC"), Appellee here, the Mortgage "together with the [N]ote described [therein] and the moneys due and to become due thereon." (Dkt. No. 8, **Bankruptcy** Record, Exs. 27 and 9.)

On February 2, 2009, HSBC moved for relief from the automatic **bankruptcy** stay. (Id., Ex. 20.) The motion alleged that, after Harris had entered into the Mortgage Agreement with MERS as Fremont's nominee, both the Mortgage and the Note had been transferred to HSBC by assignment. (Id. ¶ 3.)

In February 2009, Harris initiated Adversary Proceeding No. 09-03008 ("the First Adversary Proceeding") alleging, inter alia, that HSBC lacked standing to participate in the **bankruptcy** proceeding. The intent behind the proceeding, it would appear, was to head off HSBC's motion for relief from the stay. The **Bankruptcy** Court granted HSBC's motion to dismiss this proceeding on April 23, 2009. Harris timely filed a motion for reconsideration of this ruling.

On August 25, 2009, while the motion for reconsideration was pending, HSBC withdrew its lift-stay motion with the explanation that "new counsel will be appearing on behalf of" HSBC. (Id., Ex. 9.)

On August 28, 2009, HSBC filed a second motion for relief **[*4]** from the automatic stay. This second lift-stay motion failed to allege that HSBC was the holder or assignee of the Note. Significantly, the second motion also failed to include the Note or a copy of the Note as an exhibit. (Id., Ex. 7.)

On August 31, 2009, Harris timely filed an Objection to Motion for Relief from Stay, arguing (as he had earlier) that HSBC had failed to demonstrate "standing to declare default and foreclose on a debt it does not own." (Id., Ex. 6 ¶ 5.) However, Harris mistakenly filed this objection in the First Adversary Proceeding rather than the core **bankruptcy** proceeding, and it appears that this objection might not have come to the **Bankruptcy** Court's attention.

On October 15, 2009, the **Bankruptcy** Court denied Harris's motion for reconsideration of its dismissal of the First Adversary Proceeding. In its memorandum, the court declined to rule on Harris's argument that HSBC lacked standing to participate in the **bankruptcy** proceeding, noting that HSBC had withdrawn the first lift-stay motion and that the issue of standing was "hypothetical" in the absence of any pending lift-stay motion. (Id., Ex. 5.) The **Bankruptcy** Court did not address the second lift-stay motion **[*5]** by HSBC, which had been filed during the court's deliberations and was pending (along with Harris's objection) when the order issued.

On October 26, 2009, Harris filed Adversary Proceeding 09-03052 ("the Second Adversary

Proceeding"), seeking, among other things, to oppose the second motion to lift the automatic stay. (Id., Ex. 4 ¶¶ 47-48, 50-51.)

On October 29, 2009, the **Bankruptcy** Court granted HSBC's second lift-stay motion, noting that it had not been opposed. (Id., Ex. 3.) This conclusion was technically correct since, although Harris did in fact vigorously oppose the motion, he had not made his opposition known in the proper procedural pigeon hole. He had filed it in the Second Adversary Action, rather than the core **bankruptcy** proceeding.

On November 3, 2009, Harris attempted to file a motion for reconsideration of both the **Bankruptcy** Court's October 29 order lifting the automatic stay and the October 15 order denying reconsideration of the order dismissing the First Adversary Proceeding. Harris filed this motion for reconsideration in the Second Adversary Proceeding. (Id., Ex. 2.)

On November 9, 2009, the **Bankruptcy** Court denied the motion for reconsideration, noting correctly that **[*6]** "the court has not dismissed [the Second Adversary Proceeding]." (Id., Ex. 1.) [1] The order did not specifically address Harris's request for reconsideration of the lift-stay order.

FOOTNOTES

1 The Second Adversary Proceeding was ultimately dismissed on res judicata grounds on March 12, 2010.

On November 19, Harris filed a Notice of Appeal with the **Bankruptcy** Court. This appeal followed. [2]

FOOTNOTES

2 As noted, in addition to appealing, Harris has also sought "Leave to Appeal." (Dkt. No. 3.) This motion is superfluous, since HN1 "[f]inal judgments, orders, and decrees" of the **Bankruptcy** Court are appealable as of right and without the approval of this court. 28 U.S.C. § 158(a)(1) . "[A]n order lifting an automatic stay is an order disposing of a discrete dispute, and it is therefore final and appealable." Tringali v. Hathaway Machinery Co., 796 F.2d 553, 558 (1st Cir. 1986) . In general, an order denying a motion for reconsideration is also a final, appealable order. Stone v. INS, 514 U.S. 386, 401, 115 S. Ct. 1537, 131 L. Ed. 2d 465 (1995) (analogizing an order denying reconsideration of a final deportation order to an order denying a motion under Fed. R. Civ. P. 60 (b)). Accordingly, the Motion for Leave to Appeal will be denied as moot, and the **[*7]** court will proceed directly to adjudicate the appeal.

On December 12, 2009, HSBC filed a motion to dismiss the appeal on the theory that it was not timely filed. On February 23, 2010, this court heard oral argument on that motion, and on February 24, 2010, the motion to dismiss was denied without prejudice. The merits of the appeal are now squarely before this court.

III. DISCUSSION

Harris appeals the **Bankruptcy** Court's order of November 9, 2009, denying his motion to reconsider the order lifting the automatic stay. He argues that HSBC did not demonstrate sufficient interest in the property at issue to justify the **Bankruptcy** Court's lifting the automatic stay at HSBC's request -- specifically, that "[t]here is a break in the chain of assignments, and the current owner of the note is at issue." (Dkt. No. 3 ¶ 4.)

HSBC argues (1) that the appeal is untimely, (2) that claim preclusion bars Harris from opposing the relief from stay, and (3) that HSBC successfully demonstrated a colorable claim to the estate property.

A. Standard of Review.

HN2 On a **bankruptcy** appeal, the district court reviews the **bankruptcy** court's legal determinations de novo and its factual determinations for clear error. Fed. R. Bankr. P. 8013; **[*8]** In re CK Liquidation Corp., 343 B.R. 376, 380 (D. Mass. 2006) (citing In re Healthco Int'l, Inc., 132 F.3d 104, 107 (1st Cir. 1997)).

HN3 Rule 59 (e) of the Federal Rules of Civil Procedure is applicable to **bankruptcy** cases in which a motion for reconsideration is filed "no later than 14 days after entry of judgment." Fed. R. Bankr. P. 9023. Under Rule 59(e), a motion for reconsideration should be granted only where the relevant argument was raised before judgment issued. Harley Davidson Motor Co., Inc. v. Bank of New England, 897 F.2d 611, 616 (1st Cir. 1990). If a motion for reconsideration is to be allowed, the motion must establish either a "manifest error of law" or present newly discovered evidence. Federal Deposit Ins. Corp. v. World University, Inc., 978 F.2d 10, 16 (1st Cir. 1992).

In general, HN4 a motion for reconsideration is reviewed for abuse of discretion. See Appeal of Sun Pipe Line Co., 831 F.2d 22, 25 (1st Cir. 1987). This standard applies to orders by the **Bankruptcy** Court as well. In re Tardugno, 241 B.R. 777, 779 (B.A.P. 1st Cir. 1999).

B. Timeliness of the Appeal.

HN5 To appeal an order of the **Bankruptcy** Court, an appellant must file notice of appeal within fourteen days of the **[*9]** date of the order appealed from. Fed. R. Bankr. P. 8002(a). Unless properly extended by the **Bankruptcy** Court, this fourteen-day period is mandatory and jurisdictional. In re Abdallah, 778 F.2d 75, 77 (1st Cir. 1985). For this appeal, the period was not extended, and the fourteen-day time limit governs.

Notice of this appeal was filed on November 19, 2009. HSBC argues that Harris seeks to appeal either the **Bankruptcy** Court's October 25, 2009 order (dismissing the First Adversary Proceeding) or the **Bankruptcy** Court's October 29, 2009 order (allowing HSBC's motion for relief from stay). The November 19 notice is not timely with respect to either order.

At oral argument before this court, however, Harris explained that he seeks to appeal the order of November 9, 2009, denying his motion for reconsideration of the dismissal of the First Adversary Proceeding and (sub silentio) his motion for reconsideration of the allowance of the lift-stay motion. The November 19 notice is timely with respect to the November 9 order.

HSBC argues that Harris's November 3 motion for reconsideration, as denied on November 9, cannot relate to the lift-stay order because the motion for reconsideration (1) makes **[*10]** no more than "a cursory reference" to the stay and (2) was filed in an adversary proceeding rather than the underlying **bankruptcy.** (Dkt. No. 13, HSBC's Reply Brief 8.) Both arguments fail.

First, the references to the stay are not cursory. The first sentence of his motion reads as follows: "Now comes Plaintiff, Roney Harris, and moves this Court to reconsider its action to dismiss Plaintiff's Adversarial Proceedings, and its granting of Defendants' Motion to Lift Stay." (Dkt. No. 8, **Bankruptcy** Record, Ex. 2 at 1) (emphasis added). Harris's motion subsequently argues that "[HSBC's] proof does not even show who presently holds the note. That alone provides sufficient basis to deny the motion for relief from stay." (Id. ¶ 10.) This is sufficient to save his rights with respect to this appeal.

Second, HN6"Pro se filings are held to a less stringent procedural standard than others." Nunnally v. MacCausland, 996 F.2d 1, 6 n.8 (1st Cir. 1993) (citing Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)). Harris appears pro se, and this court will interpret his submissions with the appropriate latitude. With that in mind, Harris's practice of frequently filing his papers in the wrong proceeding, while a **[*11]** serious impediment to the adjudication of his disputes, should not prevent a court's consideration of any timely filed documents that appear on the record and that support Harris's appeal.

The court will therefore treat this appeal as a timely challenge to an order denying reconsideration of an order to lift the automatic **bankruptcy** stay.

C. Issue Preclusion.

HSBC argues that, after October 15, 2009, issue preclusion barred Harris from contesting HSBC's claim to the property. HN7For issue preclusion to apply, three elements must be met: (1) the issue must be actually litigated, (2) there must be a full and final judgment, and (3) the determination must be essential to the judgment. Jarosz v. Palmer, 436 Mass. 526, 766 N.E.2d 482, 486 (Mass. 2002). HSBC argues that the issue of its claim to the property was actually litigated during the First Adversary Proceeding. HSBC reasons that, because the **Bankruptcy** Court dismissed that proceeding, it had in effect found that HSBC "had standing to enforce the mortgage." (Dkt. No. 13 at 10-11.)

However, in its Memorandum of Decision dismissing the First Adversary Proceeding, the **Bankruptcy** Court explicitly declined to make findings on that issue:

Harris attacks HSBC's **[*12]** authority or standing . . . to prosecute its lien on his Connecticut property, but that contest can not be pursued in this Chapter 7 case, inasmuch as . . . HSBC has withdrawn its motion seeking relief from the automatic stay to foreclose on the property.

(Dkt. No. 8, **Bankruptcy** Record, Ex. 5 at 4.) Because the Order of Dismissal makes no finding with respect to HSBC's standing to prosecute its claim to the property, the order lacks preclusive effect on that issue.

D. The **Bankruptcy** Court's Denial of the Lift-Stay Motion and the Motion for

Reconsideration.

1. The Lift-Stay Motion.

HN8 On a motion for relief from stay, the court must determine whether the moving party's claim to the property at issue is colorable.

[A] court hearing a motion for relief from stay should seek only to determine whether the party seeking relief has a colorable claim to property of the estate. . . . If a court finds that likelihood to exist, this is not a determination of the validity of those claims, but merely a grant of permission from the court allowing that creditor to litigate its substantive claims elsewhere.

Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33-34 (1st Cir. 1994). In this case, HSBC's claim to **[*13]** the Property is colorable only if HSBC has standing to bring a foreclosure action. HN9 In Connecticut, the holder of a mortgage may not foreclose unless the mortgage holder holds or has been assigned the underlying note. Fleet Nat'l Bank v. Nazareth, 75 Conn. App. 791, 818 A.2d 69, 71 (Conn. App. Ct. 2003) ("The plaintiff has failed to cite any authority, nor has our research found any, to support its claim that it has standing to foreclose on the mortgage without ever having been assigned the note.").

Harris argues that HSBC lacks standing to bring a foreclosure action, offering the straightforward argument that HSBC cannot show that it was ever assigned the Note. If HSBC cannot plausibly explain how it was assigned the Note, then HSBC has no right to enforce the Note, no standing to foreclose on the mortgaged property, and hence no colorable claim to the estate property.

HSBC claims to have received the Note through assignment or transfer. [3] (Dkt. No. 8, **Bankruptcy** Record, Ex. 7; Dkt. No. 13, Appellee's Reply Brief 8.) HN10 An assignee who is not a holder may enforce a note under some circumstances. However, there is no presumption of enforceability where the transferred note is issued in another's name.

FOOTNOTES

3 HSBC **[*14]** does not claim to be a holder of the Note. A holder is one that takes a negotiable instrument by negotiation. Conn. Gen. Stat. § 42a-3-201(a) (2010). Negotiation requires both transfer of physical possession and endorsement. Conn. Gen. Stat. § 42a-3-201(b) (2010). There is no evidence on the record of endorsement to HSBC.

[T]here is no presumption . . . that the transferee, by producing the note, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

Bank of N.Y. v. Gagnon, 2009 Conn. Super. LEXIS 1363 at *7 (Conn. Super. Ct. May 19, 2009) (quoting 11 Am.Jur.2d 582, Bills and Notes §214 (2009) (ellipses in original)). In other words, an individual may be in possession of a note payable by its terms to some third party, but mere possession does not entitle the individual to collect on the note. The individual has to provide some proof of how the note was acquired.

The Note states that it is payable to Fremont. The record before the court contains scant

evidence, if any, of any transaction through which HSBC was **[*15]** assigned the Note. Significantly, the explanations that HSBC has advanced for its alleged entitlement are mutually contradictory. In the first lift-stay motion, HSBC claimed that the Note was transferred from MERS to HSBC by assignment. (Dkt. No. 8, **Bankruptcy** Record, Ex. 20.) In the second lift-stay motion, HSBC failed to allege that it was the bona fide assignee of the Note at all. (Dkt. No. 8, **Bankruptcy** Record, Ex. 7.) In this appeal, HSBC's attorney proffers that HSBC acquired the Note when it was "securitized and pooled along with numerous other loans and held in trust" by HSBC. (Dkt. No. 13, HSBC's Reply Brief 8.)

At this stage of the proceedings, HSBC has not proven or even explained how it acquired the Note. HSBC has therefore not demonstrated a colorable claim to the estate property.

2. The Motion for Reconsideration.

It appears from the confused record of this case that the **Bankruptcy** Court has not yet considered the substance of Harris's argument in support of reconsideration -- that HSBC cannot prove assignment of the Note. Admittedly, this confusion seems to have resulted in large part from the deficiencies in Harris's presentation of his case. His arguments -- both in writing **[*16]** and at the hearing -- were often disorganized and hard to follow.

Inartful as his pleadings were, though, Harris never waived, and indeed always adequately preserved, his argument that the Note's ownership had not been adequately substantiated. He raised the issue in his opposition, his motion for reconsideration, and again on appeal. He successfully preserved his rights and, in the Motion for Reconsideration, he made his argument with remarkable cogency:
The question at issue is: Who held (or holds) the note and has standing to enforce it[?] . . . [T]he movant's proof does not even show who presently holds the note. That alone provides sufficient basis to deny the motion for relief from stay, and to do other wise is a manifest error of law.
(Dkt. No. 8, **Bankruptcy** Record, Ex. 2, Motion to Reconsider ¶ 10.)

Of course, Appellee may well have a valid substantive argument in support of its position that it has standing to enforce the Note. So far, however, it has never been required to present one. Harris is therefore entitled to make his argument and have the issue addressed directly.

IV. CONCLUSION

For the foregoing reasons, Appellant's Motion for Leave to Appeal (Dkt. No. 3) is hereby DENIED **[*17]** as moot, and the decision of the **Bankruptcy** Court of November 3, 2009, is hereby REVERSED and REMANDED for further proceedings.

It is so Ordered.

/s/ Michael A. Ponsor

MICHAEL A. PONSOR

U. S. District Judge

JUDGMENT IN A CIVIL CASE

Michael A. Ponsor, D.J.

[] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

JUDGMENT entered for the appellant Roney Harris, pursuant to this court's memorandum and order entered this date, reversing and remanding the November 3, 2009 decision of the **bankruptcy** court for further proceedings.

Dated: September 28, 2010

DENISE MEGAN BRONSDON, Debtor. DENISE MEGAN BRONSDON, Plaintiff-Appellee, v. EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Defendant-Appellant.

BAP NO. MB 10-009

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2010 Bankr. LEXIS 3092

September 21, 2010, Decided

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. **Bankruptcy** Case No. 07-14215-FJB. Adversary Proceeding No. 08-01062-MSH. (Hon. Joel B. Rosenthal, U.S. **Bankruptcy** Judge).
Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), 2010 Bankr. LEXIS 71 (Bankr. D. Mass., Jan. 8, 2010)

CASE SUMMARY
PROCEDURAL POSTURE: Appellant, a student loan creditor, challenged a decision of the U.S. **Bankruptcy** Court for the District of Massachusetts, which concluded that appellee debtor's failure to participate in the William D. Ford Federal Direct Loan Program was insufficient to overcome a finding of undue hardship under 11 U.S.C.S. § 523(a)(8), and again discharged the loans.

OVERVIEW: Under 11 U.S.C.S. § 523(a)(8), debtors were not permitted to discharge educational loans unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents. As to interpreting "undue hardship," the Panel declined to adopt the Brunner test. The Panel was persuaded that the totality of the circumstances test best effectuated the determination of undue hardship while adhering to the plain text of § 523(a)(8). A debtor's eligibility to participate in the income contingent repayment plan (ICRP) could be considered when applying the totality of the circumstances test, but it was not determinative. On remand, the **bankruptcy** court clearly stated that, despite debtor's eligibility for the Ford Program, her ability to repay the debt was unrealistic in light of her age, inability to pass the Massachusetts bar examination, difficulty finding employment, and other burdens. These circumstances were amply supported by the record and were appropriate factors to be considered under the test. Thus, the **bankruptcy** court adequately considered debtor's decision to forego enrollment in the ICRP as a factor within the totality of the circumstances.

OUTCOME: The **bankruptcy** court's decision was affirmed.

CORE TERMS: undue hardship, student loans, totality, repayment, repay, good faith efforts, standard of living, eligibility, discharged, monthly, financial resources, dischargeability, exam, failure to participate, work experience, tax liability, forgiveness, patent, novel, novo, loan obligations, time of trial, work history, unsuccessful attempts, living expenses, foreseeable future, bad faith, adjusted gross income, educational, hardship

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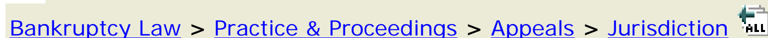
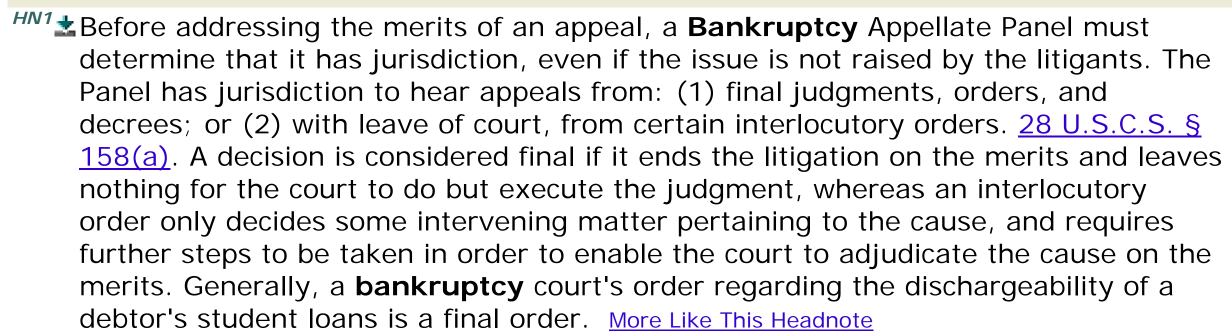

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

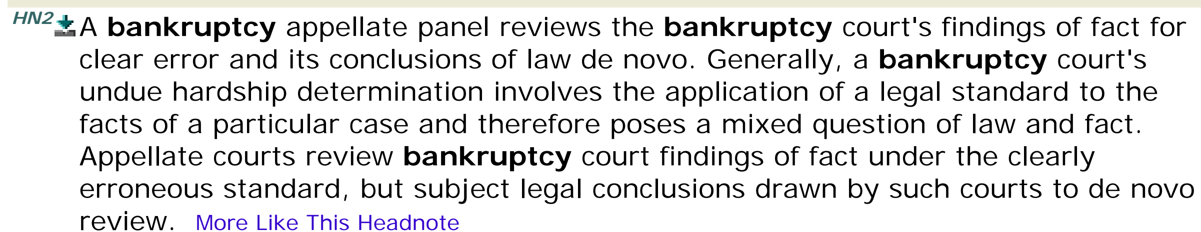
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders


HN1 Before addressing the merits of an appeal, a **Bankruptcy** Appellate Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. The Panel has jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C.S. § 158(a). A decision is considered final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment, whereas an interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. Generally, a **bankruptcy** court's order regarding the dischargeability of a debtor's student loans is a final order. More Like This Headnote

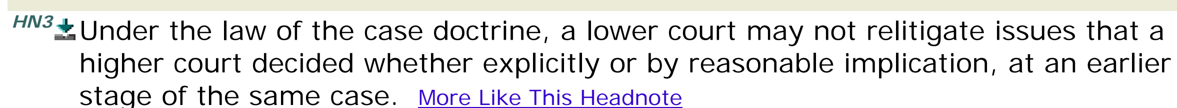
Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

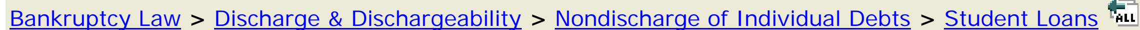
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review


HN2 A **bankruptcy** appellate panel reviews the **bankruptcy** court's findings of fact for clear error and its conclusions of law de novo. Generally, a **bankruptcy** court's undue hardship determination involves the application of a legal standard to the facts of a particular case and therefore poses a mixed question of law and fact. Appellate courts review **bankruptcy** court findings of fact under the clearly erroneous standard, but subject legal conclusions drawn by such courts to de novo review. More Like This Headnote

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Law of the Case


HN3 Under the law of the case doctrine, a lower court may not relitigate issues that a higher court decided whether explicitly or by reasonable implication, at an earlier stage of the same case. More Like This Headnote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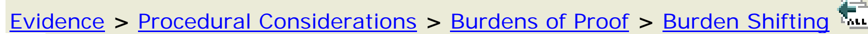
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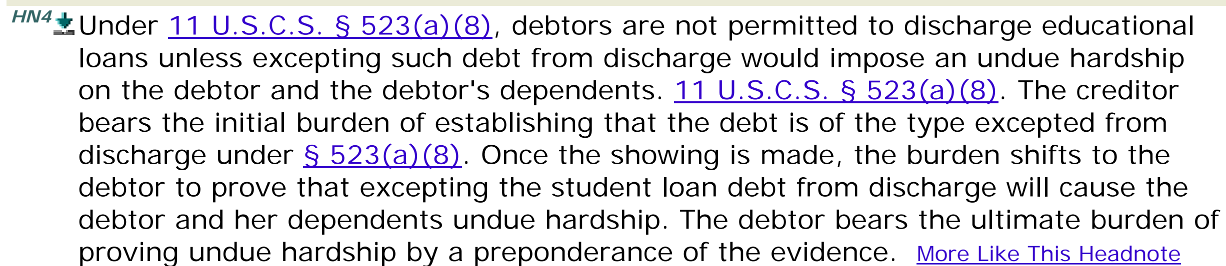
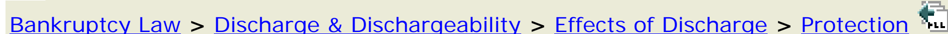
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence


HN4 Under 11 U.S.C.S. § 523(a)(8), debtors are not permitted to discharge educational loans unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C.S. § 523(a)(8). The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8). Once the showing is made, the burden shifts to the debtor to prove that excepting the student loan debt from discharge will cause the debtor and her dependents undue hardship. The debtor bears the ultimate burden of proving undue hardship by a preponderance of the evidence. More Like This Headnote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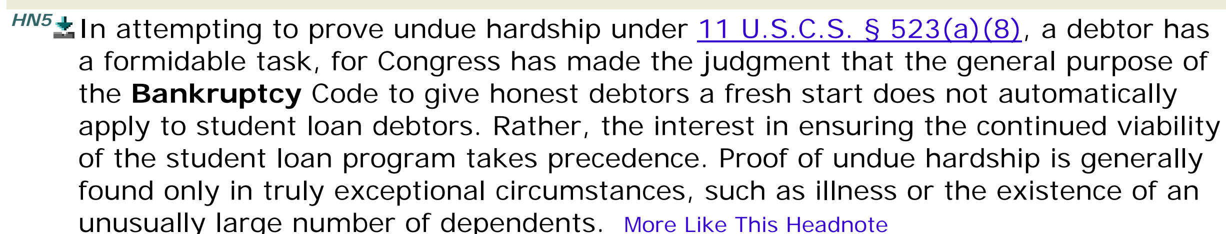
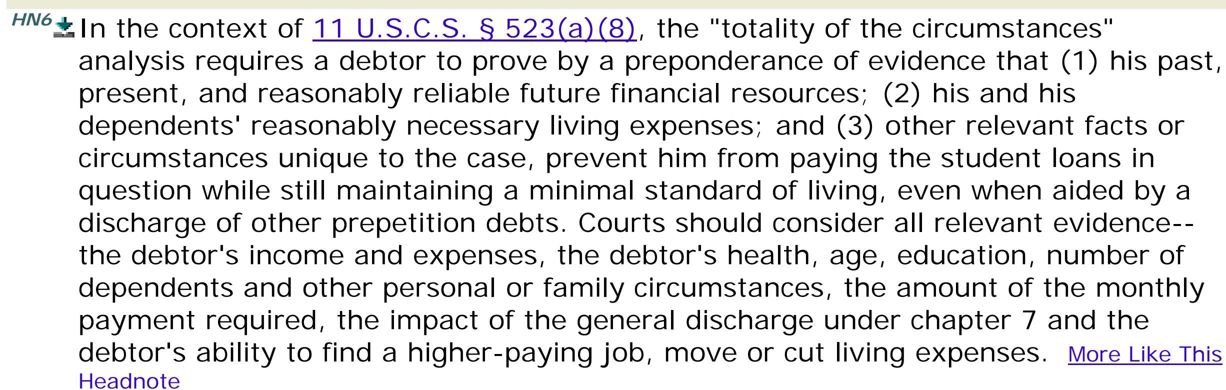
Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans


HN5 In attempting to prove undue hardship under 11 U.S.C.S. § 523(a)(8), a debtor has a formidable task, for Congress has made the judgment that the general purpose of the **Bankruptcy** Code to give honest debtors a fresh start does not automatically apply to student loan debtors. Rather, the interest in ensuring the continued viability of the student loan program takes precedence. Proof of undue hardship is generally found only in truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents. More Like This Headnote

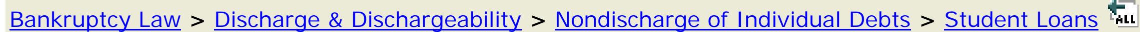
Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence


HN6 In the context of 11 U.S.C.S. § 523(a)(8), the "totality of the circumstances" analysis requires a debtor to prove by a preponderance of evidence that (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. Courts should consider all relevant evidence--the debtor's income and expenses, the debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under chapter 7 and the debtor's ability to find a higher-paying job, move or cut living expenses. More Like This Headnote

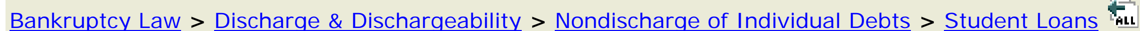
Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans



HN7 In the context of 11 U.S.C.S. § 523(a)(8), the "totality test" looks to past, present, and future "financial resources" and "necessary living expenses" and whether, taken together with other factors, the debtor has the ability to repay while maintaining a minimal standard of living. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

HN8 In the context of 11 U.S.C.S. § 523(a)(8), under the totality of the circumstances approach, a court may (also) consider any additional facts and circumstances unique to the case that are relevant to the central inquiry (i.e., the debtor's ability to maintain a minimum standard of living while repaying the loans). More Like This Headnote



Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

Evidence > Procedural Considerations > Burdens of Proof > Allocation

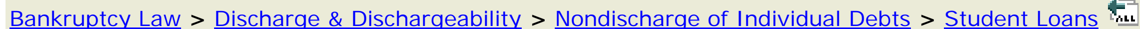
Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

HN9 Regarding 11 U.S.C.S. § 523(a)(8), ultimately, a debtor must establish by a preponderance of the evidence that her present and future actual circumstances would impose an undue hardship if her debts are excepted from discharge. Irrespective of the test, the decision of a **bankruptcy** court, whether the failure to discharge a student loan will cause undue hardship to the debtor and the dependents of the debtor under § 523(a)(8), rests on both the economic ability to repay and the existence of any disqualifying action(s). The party opposing the discharge of a student loan has the burden of presenting evidence of any disqualifying factor, such as bad faith. The debtor is not required under the statute to establish prepetition good faith in absence of a challenge. The debtor should not be obligated to prove a negative, that is, that he did not act in bad faith, and, consequently, acted in good faith. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

HN10 In the context of 11 U.S.C.S. § 523(a)(8), undue hardship is measured as of trial date, and is a forward-looking concept. Placing emphasis on prepetition failure to pay misconstrues the wording of the undue hardship requirement in the statute. Distilled to its essence, the finding of undue hardship under § 523(a)(8) following the totality of the circumstances test rests on one basic question: Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans? Answering said question leads the **bankruptcy** court to discharge its task of making a principled determination of the requirement's meaning and a careful review of the debtor's circumstances. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans



HN11 The totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of 11 U.S.C.S. § 523(a)(8). More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

HN12 In the context of 11 U.S.C.S. § 523(a)(8), although courts applying the totality of the circumstances test have treated the income contingent repayment plan (ICRP) differently, the weight of authority is to treat the ICRP as one of many factors to consider in evaluating the totality of the debtor's circumstances. Thus, a debtor's eligibility to participate in the ICRP may be considered by the court when applying the totality of the circumstances test, but it is not determinative. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

HN13 The Ford Program allows student loans to be consolidated and payments on the consolidated loan to be adjusted based on a formula that takes into account poverty guidelines and a debtor's adjusted gross income. 34 C.F.R. § 685.100, et seq. One of the consolidation options under the Ford Program is the income contingent repayment plan (ICRP). 34 C.F.R. §§ 685.208, 685.209. Under the ICRP, an eligible debtor's annual loan payment is generally equal to 20 percent of the difference between his or her adjusted gross income and the federal poverty guidelines for the debtor's family size, regardless of the amount of unpaid student loan debt. 34 C.F.R. § 685.209. Repayments are made monthly. 34 C.F.R. § 685.208(k). ICRP payments are recalculated annually based on changes to the debtor's reported household adjusted gross income. 34 C.F.R. § 685.209. Unpaid interest is capitalized until the outstanding principal is ten percent greater than the original principal amount. 34 C.F.R. § 685.209(c)(5). If the borrower has not repaid the loan at the end of 25 years, the unpaid portion of the loan is cancelled. 34 C.F.R. § 685.209(c)(4)(i). More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Student Loans

HN14 In the context of 11 U.S.C.S. § 523(a)(8), courts considering the income contingent repayment plan (ICRP) as a factor under the totality of the circumstances test evaluate both the benefits and drawbacks of the program for the individual debtor within his or her unique circumstances. More Like This Headnote

COUNSEL: John F. White, Esq., and Troy A. Gunderman, Esq., on brief for Defendant-Appellant.

Denise M. Bronsdon, Pro se, on brief for Plaintiff-Appellee.

JUDGES: Before Haines, Lamoutte, and Tester, United States **Bankruptcy** Appellate Panel Judges. Haines, Chief U.S. **Bankruptcy** Appellate Panel Judge, concurring.

OPINION BY: Lamoutte

OPINION

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

This appeal arises out of an adversary proceeding filed by Denise Bronsdon (the "Debtor") seeking to discharge her student loan obligations to Educational Credit Management Corporation ("ECMC") on the grounds of undue hardship pursuant to § 523(a)(8). [1] The **bankruptcy** court initially concluded that repayment of the student loans would impose an undue hardship on the Debtor and discharged the loans. [2] On appeal, the U.S. District Court for the District of Massachusetts (the "district court") vacated the **bankruptcy** court's decision and remanded the matter to the **bankruptcy** court to consider the impact that participation in the William D. Ford **[*2]** Federal Direct Loan Program (the "Ford Program") would have on the undue hardship analysis. [3] On remand, the **bankruptcy** court concluded that the Debtor's failure to participate in the Ford Program was insufficient to overcome a finding of undue hardship under § 523(a)(8), and again discharged the loans. [4] ECMC appealed.

FOOTNOTES

1 Unless expressly stated otherwise, all references to " **Bankruptcy** Code" or to specific statutory sections shall be to the **Bankruptcy** Reform Act of 1978, as amended by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

2 See Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), Adv. Pro. No. 08-1062, 2009 Bankr. LEXIS 69 (Bankr. D. Mass. Jan. 13, 2009) .

3 See Educ. Credit Mgmt. Corp. v. Bronsdon, 421 B.R. 27 (D. Mass. 2009) .

4 See Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), Adv. Pro. No. 08-1062, 2010 Bankr. LEXIS 71 (Bankr. D. Mass. Jan. 8, 2010) .

For the reasons set forth below, we **AFFIRM**.

BACKGROUND

A. The Debtor's Personal Background

At the time of trial in January 2009, the Debtor was 64 years old and single. She did not have any dependents nor did she suffer from any disability **[*3]** or debilitating

medical condition. In 1994, the Debtor, at the age of 50, received a bachelor's degree in English from Wellesley College. Thereafter, from 1996 until 2002, she worked at various jobs as a legal secretary until she decided to go to law school. She enrolled in Southern New England School of Law, and graduated in the top half of her class in December 2005. To finance her law school education, the Debtor took out the student loans now at issue, which at some point were assigned to ECMC. As of September 8, 2008, the loans totaled $82,049.45.

After law school, the Debtor failed the bar exam three times, each time by a significant margin. She does not plan to take the bar exam again because she has no money to pay for the exam fee or preparation materials, and because she has not come close to passing.

After graduating from law school, the Debtor worked briefly as a receptionist and as a temporary patent prosecution secretary at two different law firms. Although she continually went on interviews, made telephone calls, and spoke with employment agencies in an effort to find any kind of secretarial, receptionist, or contract manager work, she was unable to find employment. The **[*4]** Debtor pursued alternate means of earning income, but her attempts were unsuccessful. [5] At the time of trial, the Debtor's only income was a monthly Social Security payment of $946.00. She owned no real property and lived temporarily in her father's house.

FOOTNOTES

[5] For example, the Debtor wrote a novel but was unable to find a publisher. She also applied for a patent on an invention to protect the privacy of hospital patients. At the time of trial, the Debtor had not received a response regarding the patent, and was considering writing another novel or starting a website that would feature commentary on current events.

B. Procedural History

The Debtor filed a chapter 7 petition in July 2007, and received a discharge in December 2007. Thereafter, the Debtor filed an adversary complaint seeking to discharge her student loan obligations to ECMC. [6] At ECMC's request, the **bankruptcy** court took judicial notice of the Ford Program, 34 C.F.R. §§ 685.100, et seq. The Ford Program offers, among other things, a student loan consolidation repayment option known as the income contingent repayment plan (the "ICRP").

FOOTNOTES

[6] The original complaint was filed against "Sallie Mae, Inc." However, the **bankruptcy** court subsequently **[*5]** granted ECMC's motion to intervene and be substituted as the defendant in the proceeding.

After a trial, the **bankruptcy** court issued an order and decision (the "First Decision") discharging the debts owed to ECMC. In the First Decision, the **bankruptcy** court applied a totality of the circumstances test to determine whether the Debtor would suffer an undue hardship. 2009 Bankr. LEXIS 69, at *7. In applying this standard, the **bankruptcy** court found that, given the Debtor's lack of recent work history, narrow work experience, failure to pass the bar exam, age, unsuccessful attempts to find employment in a variety of fields, and unsuccessful attempts to sell a novel and acquire a patent, the Debtor had no reasonably reliable future financial resources other than the Social Security payments. Id. at *12-14.

The **bankruptcy** court also recognized that if the Debtor participated in the Ford Program, her current financial status would not require monthly payments. Id. at *11. It rejected ECMC's argument that repayment would not cause the Debtor an undue hardship because the Debtor would not be required to make monthly payments under the program. The **bankruptcy** court stated that if the Debtor were **[*6]** to participate in the Ford Program, "the student loan forgiveness at the conclusion of her participation in the program would result in a tax liability that would subject the Debtor's Social Security benefits to garnishment," which would "promote a vicious cycle that could leave the Debtor in a financial state much more desperate than the one she is currently enduring." Id. Additionally, the **bankruptcy** court referred to its reasoning in In re Denittis, 362 B.R. 57, 64-65 (Bankr. D. Mass. 2007), in which it concluded that consideration of the Ford Program in the undue hardship analysis would, in effect, foreclose a conclusion of undue hardship whenever a debtor is eligible to participate. Bronsdon, 2009 Bankr. LEXIS 69, at *11.

On appeal to the district court, ECMC contested the **bankruptcy** court's factual findings regarding the Debtor's good faith efforts to find work and that she was not likely to earn income in the future. ECMC also argued that the **bankruptcy** court made errors of law concerning the ICRP. At the outset, the district court noted the two tests for determining undue hardship, but stated that the test to be applied was not a material issue in this case as the result was **[*7]** the same under both tests. The district court then determined that there was ample evidence supporting the **bankruptcy** court's factual findings and, therefore, that the findings were not clearly erroneous. It also concluded that the **bankruptcy** court had made a legal error by "giving no weight to the ICRP in the undue hardship analysis." As a result, the district court vacated the First Decision and remanded the matter to the **bankruptcy** court to consider the impact that participating in the ICRP would have on the undue hardship analysis.

On remand, the **bankruptcy** court concluded that "the Debtor's failure to participate in the ICRP [wa]s insufficient to demonstrate a lack of good faith (again assuming such finding is integral to the test under § 523(a)(8)) when weighed against this Debtor's efforts to try to improve her financial circumstance," and ordered that the student loans owed to ECMC were discharged. This appeal ensued.

JURISDICTION

HN1 Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). **[*8]** The Panel has jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory

orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re Am. Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). Generally, a **bankruptcy** court's order regarding the dischargeability of a debtor's student loans is a final order. See Educ. Credit Mgmt. Corp. v. Kelly (In re Kelly), 312 B.R. 200, 204 (B.A.P. 1st Cir. 2004).

STANDARD OF REVIEW

HN2 The Panel reviews the **bankruptcy** court's findings of fact for clear error and its conclusions of law *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719 n.8 (1st Cir. 1994). **[*9]** Generally, a **bankruptcy** court's undue hardship determination involves the application of a legal standard to the facts of a particular case and therefore poses a mixed question of law and fact. See TI Fed. Credit Union, 72 F.3d at 928; see also Nash v. Conn. Student Loan Found. (In re Nash), 446 F.3d 188, 191 (1st Cir. 2006); Lorenz v. Am. Educ. Servs./Pa. Higher Educ. Assistance Agency (In re Lorenz), 337 B.R. 423, 429 (B.A.P. 1st Cir. 2006). "Appellate courts review **bankruptcy** court findings of fact under the clearly erroneous standard, but subject legal conclusion[s] drawn by such courts to *de novo* review." TI Fed. Credit Union, 72 F.3d at 928.

The district court determined that the **bankruptcy** court's factual findings were not clearly erroneous, and, therefore, no factual issues were determined by the **bankruptcy** court on remand. Thus, the **bankruptcy** court's findings may not be challenged in this appeal. See Ellis v. U.S., 313 F.3d 636, 646 (1st Cir. 2002) (quoting Flibotte v. Pa. Truck Lines, Inc., 131 F.3d 21, 25 (1st Cir. 1997)) (holding that HN3 under the law of the case doctrine, a lower court may not relitigate issues that a higher court decided "whether explicitly or by reasonable **[*10]** implication, at an earlier stage of the same case."). Therefore, the standard of appellate review is *de novo* because the issues presented concern matters of law, not of fact. See Braunstein v. McCabe, 571 F.3d 108, 124 (1st Cir. 2009).

DISCUSSION

I. The Appropriate Legal Standard

A. The Burden of Proof

HN4 Under § 523(a)(8), debtors are not permitted to discharge educational loans "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). The creditor bears the initial burden of establishing that the debt is of the type excepted from discharge under § 523(a)(8). Once the showing is made, the burden shifts to the debtor to prove that excepting the student loan debt from discharge will cause the debtor and her dependents "undue hardship." Educ. Credit Mgmt. Corp. v. Savage (In re Savage), 311 B.R. 835 (B.A.P. 1st Cir. 2004); see also Smith v. Educ. Credit Mgmt. Corp. (In re Smith), 328 B.R. 605 (B.A.P. 1st Cir. 2005). The debtor bears the ultimate burden of proving undue hardship by a preponderance of the evidence. See Grogan v. Garner,

498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); Burkhead v. U.S. (In re Burkhead), 304 B.R. 560, 564 (Bankr. D. Mass. 2004). **[*11]** [7]

FOOTNOTES

7 HN5 In attempting to prove undue hardship under § 523(a)(8) , a debtor:

. . . has a formidable task, for Congress has made the judgment that the general purpose of the **Bankruptcy** Code to give honest debtors a fresh start does not automatically apply to student loan debtors. Rather, the interest in ensuring the continued viability of the student loan program takes precedence.

Nash, 446 F.3d at 191 (citation omitted). Proof of undue hardship is generally found only in "truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents." T.I. Fed. Credit Union v. DelBonis, 72 F.3d 921, 927 (1st Cir. 1995) .

B. The Tests for Determining Undue Hardship

The **Bankruptcy** Code does not define "undue hardship" and courts have struggled with its meaning. After several decades of case law interpreting this term, essentially two tests have emerged -- the so-called Brunner test and the "totality of the circumstances" test. As the First Circuit has noted:

. . . [N]ine circuit courts of appeal [] have followed the Second Circuit's test set forth in Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (per curiam). This is a tripartite test, **[*12]** requiring that the debtor show inability, at her current level of income and expenses, to maintain a "minimal" standard of living; the likelihood that this inability will persist for a significant portion of the repayment period; and the existence of good faith efforts to repay the loans. Id. at 396.

A facially different test is the Eighth Circuit's totality-of-circumstances test, which would have courts consider the debtor's reasonably reliable future financial resources, his reasonably necessary living expenses, and "any other relevant facts." See Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. 2003).
Nash, 446 F.3d at 190. Although the First Circuit acknowledged the two approaches in Nash, it declined to adopt formally a particular test for determining undue hardship, and it remains an undecided issue in this circuit. See Nash, 446 F.3d at 190.

In the First Decision, the **bankruptcy** court applied the totality of the circumstances test to determine whether excepting the Debtor's student loan obligations from discharge would cause her undue hardship. The district court determined that the issue of the appropriate test was immaterial as the result would be the **[*13]** same under either test. On remand, the **bankruptcy** court again declined to endorse the Brunner test. On appeal, ECMC urges the Panel to formally adopt the so-called Brunner test. [8]

FOOTNOTES

8 ECMC, acknowledging that the First Circuit has not adopted either test for determining undue hardship, stated in its brief: "ECMC respectfully requests that this Court join the Nine Circuits that have formally adopted the Brunner test." Appellant's Brief at 5.

C. Adopting a Test

As noted above, neither the plain language of § 523(a)(8) nor the First Circuit mandate a particular test for evaluating the dischargeability of student loans. The Panel has also declined to endorse a particular test. [9] Most of the **bankruptcy** courts within the First Circuit have adopted the totality of the circumstances test over the Brunner test, [10] although a few courts within this circuit have applied Brunner instead. [11]

FOOTNOTES

9 In several prior cases involving the dischargeability of student loans under § 523(a)(8) , the Panel has declined to adopt either the Brunner or the totality of the circumstances test, finding either that the result would be the same under either test, or that the appealing party had waived the issue of the applicable **[*14]** test. See, e.g., In re Lorenz, 337 B.R. at 430 ; Joyce v. Mt. Peaks Fin. Servs., Inc. (In re Joyce), 2005 Bankr. LEXIS 1436, 2005 WL 3946869 (B.A.P. 1st Cir. Jul. 29, 2005) ; In re Kelly, 312 B.R. at 206 ; In re Savage, 311 B.R. at 839 .

10 See, e.g., Sanborn v. Educ. Credit Mgmt. Corp. (In re Sanborn), 431 B.R. 5, 2010 WL 2572717 (Bankr. D. Mass. 2010) ; Taratuska v. The Educ. Res. Inst., Inc. (In re Taratuska), 2010 Bankr. LEXIS 409, 2010 WL 583952 (Bankr. D. Mass. Feb. 12, 2010) ; Fahrenz v. Educ. Credit Mgmt. Corp. (In re Fahrenz), 2008 Bankr. LEXIS 4336, 2008 WL 4330312 (Bankr. D. Mass. Sept. 17, 2008) ; Brunell v. Citibank (S.D.) N.A. (In re Brunell), 356 B.R. 567 (Bankr. D. Mass. 2006) ; Paul v. Suffolk Univ. (In re Paul), 337 B.R. 730 (Bankr. D. Mass. 2006) ; Gharavi v. U.S. Dep't of Educ. (In re Gharavi), 335 B.R. 492, 497 (Bankr. D. Mass. 2006) ; Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks), 331 B.R. 18, 31-32 (Bankr. D. Mass. 2005) ; Bourque v. Educ. Credit Mgmt. Corp. (In re Bourque), 303 B.R. 548, 550 (Bankr. D. Mass. 2003) ; Lamanna v. EFS Servs., Inc. (In re Lamanna), 285 B.R. 347 (Bankr. D.R.I. 2002) ; Dolan v. Am. Student Assist. (In re Dolan), 256 B.R. 230,

238 (Bankr. D. Mass. 2000) ; Kopf v. Dep't of Educ. (In re Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) ; **[*15]** Phelps v. Sallie Mae Loan Serv. Ctr. (In re Phelps), 237 B.R. 527 (Bankr. D.R.I. 1999) .

11 See Gallagher v. Educ. Credit Mgmt. Corp. (In re Gallagher), 333 B.R. 169, 173 (Bankr. D.N.H. 2005) ; Grigas v. Sallie Mae Serv. Corp. (In re Grigas), 252 B.R. 866 (Bankr. D.N.H. 2000) ; Garrett v. N.H. Higher Educ. Assistance Found. (In re Garrett), 180 B.R. 358 (Bankr. D.N.H. 1995) .

To determine the appropriate test, we first examine the differences between the Brunner and the totality of circumstances approaches. As the Panel noted in In re Lorenz, the distinctions between the two tests are modest, with many overlapping considerations: [12] HN6 The "totality of the circumstances" analysis requires a debtor to prove by a preponderance of evidence that (1) his past, present, and reasonably reliable future financial resources; (2) his and his dependents' reasonably necessary living expenses; and (3) other relevant facts or circumstances unique to the case, prevent him from paying the student loans in question while still maintaining a minimal standard of living, even when aided by a discharge of other prepetition debts. Kopf, 245 B.R. at 739; see also Hicks v. Educ. Credit Mgmt. Corp. (In re Hicks), 331 B.R. 18, 31 (Bankr. D. Mass. 2005) **[*16]** (distilling so-called totality of the circumstances test to "one simple question: *Can the debtor now, and in the foreseeable future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?")*. Courts "should consider all relevant evidence - the debtor's income and expenses, the debtor's health, age, education, number of dependents and other personal or family circumstances, the amount of the monthly payment required, the impact of the general discharge under chapter 7 and the debtor's ability to find a higher-paying job, move or cut living expenses." Hicks, 331 B.R. at 31; see also Kelly, 312 B.R. at 206; Savage, 311 B.R. at 840; Bloch v. Windham Prof'ls (In re Bloch), 257 B.R. 374, 378 (Bankr. D. Mass. 2001); Kopf, 245 B.R. at 744.

The Brunner test differs, albeit modestly. See Kopf, 245 B.R. at 731 (comparing tests). Brunner requires a "three-part showing (1) that the debtor cannot, based on current income and expenses, maintain a 'minimal' standard of living for herself or her dependants if forced to repay the loans; (2) that this state of affairs is likely to persist for a significant **[*17]** portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." Brunner, 831 F.2d at 396. . . .

One can see readily that insofar as income and expenses are concerned, the tests take converging tacks. HN7 The "totality test" looks to past, present, and future "financial resources" and "necessary living expenses" and whether, taken together with other factors, the debtor has the ability to repay while maintaining a minimal standard of living. Brunner asks the same question looking to "current" income and expenses, then considers whether circumstances inhibiting repayment will endure.
In re Lorenz, 337 B.R. at 430-31.

FOOTNOTES

12 Indeed, the Panel has stated that the only practical difference between the two tests is that under Brunner, the debtor must establish that she made a good faith effort to repay the loans. See In re Kelly, 312 B.R. at 206 .

Although the two tests do not always diverge in function, they do in form. In re Hicks, 331 B.R. at 26. As the In re Hicks court noted: "While HN8 under the totality of the circumstances approach, the court may also consider 'any additional facts and circumstances unique to the case' that are relevant **[*18]** to the central inquiry (i.e., the debtor's ability to maintain a minimum standard of living while repaying the loans), the Brunner test imposes two additional requirements on the debtor that *must* be met if the student loans are to be discharged." Id. (emphasis in original). Looking to the **bankruptcy** court's extensive analysis of the predominant tests in In re Kopf, the In re Hicks court agreed with In re Kopf that the Brunner test "test[s] too much." Id. at 27.
At first blush, the second Brunner requirement - a showing that the debtor's "state of affairs is likely to persist for a significant portion of the repayment period of the student loan" - seems merely to resonate with the forward-looking nature of the undue hardship analysis. That is, under *any* undue hardship standard the debtor must show that the inability to maintain a minimum standard of living while repaying the student loans is not a temporary reality, but will continue into the foreseeable future.

Many courts interpreting and applying the second Brunner prong, however, place dispositive weight on the debtor's ability to demonstrate "additional extraordinary circumstances" that establish a "certainty of hopelessness." This **[*19]** has led some courts to require that the debtor show the existence of "unique" or "extraordinary" circumstances, such as the debtor's advanced age, illness or disability, psychiatric problems, lack of usable job skills, large number of dependents or severely limited education. . . . And, in the absence of such a showing, the court may conclude that the debtor has failed the second Brunner prong and the student loans will not be discharged. . . .

Requiring the debtor to present additional evidence of "unique" or "extraordinary" circumstances amounting to a "certainty of hopelessness" is not supported by the text of § 523(a)(8). The debtor need only demonstrate "undue hardship." True, the debtor must be able to prove that the claimed hardship is more than present financial difficulty. See Kopf, 245 B.R. at 742, 745. And the existence of any of the factors mentioned above may be highly relevant to a finding that the hardship will persist into the foreseeable future. But whether or not this Court subjectively views the debtor's circumstances as "unique" or "extraordinary" is, in a word, overkill.
In re Hicks, 331 B.R. at 27-28. We agree with this rationale and conclude that Brunner takes **[*20]** the test too far.

Furthermore, we agree that the "good faith" requirement of Brunner is "without textual foundation." Id. at 28 (citing In re Kopf, 245 B.R. at 741). HN9 Ultimately, the debtor must establish by a preponderance of the evidence that her present and future actual circumstances would impose an undue hardship if her debts are excepted from discharge. Irrespective of the test, the decision of a **bankruptcy** court, whether the failure to discharge a student loan will cause undue hardship to the debtor and the dependents of the debtor under § 523(a)(8), rests on both the economic ability to repay and the existence of any disqualifying action(s). The party opposing the discharge of a student loan has the

burden of presenting evidence of any disqualifying factor, such as bad faith. The debtor is not required under the statute to establish prepetition good faith in absence of a challenge. The debtor should not be obligated to prove a negative, that is, that he did not act in bad faith, and, consequently, acted in good faith.

HN10 Undue hardship is measured as of trial date, In re Kelly, 312 B.R. at 204, and is a forward-looking concept. In re Kopf, 245 B.R. at 744. [13] Placing emphasis on **[*21]** prepetition failure to pay misconstrues the wording of the undue hardship requirement in the statute. As stated before, distilled to its essence, the finding of undue hardship under § 523(a)(8) following the totality of the circumstances test rests on one basic question: "Can the debtor now, and in the foreseeable near future, maintain a reasonable, minimal standard of living for the debtor and the debtor's dependents and still afford to make payments on the debtor's student loans?" In re Hicks, 331 B.R. at 31. [14] Answering said question leads the **bankruptcy** court to discharge its task of making "a principled determination of the requirement's meaning and a careful review of the debtor's circumstances." In re Kopf, 245 B.R. at 741.

FOOTNOTES

13 See Feather D. Baron, The Nondischargeability of Student Loans in **Bankruptcy:** How the Prevailing "Undue Hardship" Test Creates Hardship of Its Own, 442 U.S.F. L. Rev. 265 (Summer 2007), for timing and ripeness issues in § 523(a)(8) actions.

14 See also In re Nash, 446 F.3d at 192 (stating at the outset that "[u]nder any test assessing eligibility for discharge of student loan debt, appellant must show that her current inability to maintain a minimal standard **[*22]** of living if forced to repay the debt will continue into the future.").

Having considered the various tests used to determine undue hardship, the plain text of § 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declines to adopt the Brunner test as requested by ECMC. The Panel is persuaded that HN11 the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8). [15] See In re Hicks, 331 B.R. at 32.

FOOTNOTES

15 The First Circuit has endorsed the totality of the circumstances approach in related **bankruptcy** settings. See Marrama v. Citizens Bank of Mass. (In re Marrama), 430 F.3d 474, 482 (1st Cir. 2005) (good faith is a fact intensive determination to be made on a case-by-case basis assessing the totality of the circumstances), aff'd, 549 U.S. 365, 127

S. Ct. 1105, 166 L. Ed. 2d 956 (2007) ; Merrimac Paper Co., Inc. v. Harrison (In re Merrimac Paper Co., Inc.), 420 F.3d 53, 62-63 (1st Cir. 2005) (a court sitting in equity must determine the subordination of a claim based on the totality of the circumstances in the particular case); McMullen v. Sevigny (In re McMullen), 386 F.3d 320, 328-29 (1st Cir. 2004) **[*23]** (whether a party has acted in bad faith is a quintessential issue of fact to be determined following an examination of the totality of the circumstances); Smith Barney, Inc. v. Strangie (In re Strangie), 192 F.3d 192, 196-97 n.9 (1st Cir. 1999) (concluding that in light of the entire record, and endorsing that whether to pierce a corporate veil is a factual issue to be examined under the totality of the circumstances, the **bankruptcy** court's determination that the corporate form should be respected is not clear error); First USA v. Lamanna (In re Lamanna), 153 F.3d 1, 2 (1st Cir. 1998) (adopting the totality of the circumstances test as the measure of substantial abuse under § 707(b) of the **Bankruptcy** Code); Palmacci v. Umpierrez, 121 F.3d 781, 793 (1st Cir. 1997) (fraudulent intent in a § 523(a)(2)(A) action is normally determined from the totality of the circumstances); Williamson v. Busconi, 87 F.3d 602, 603 (1st Cir. 1996) .

II. Consideration of the ICRP Under the Totality of the Circumstances Test

ECMC's primary argument on appeal is that the **bankruptcy** court failed to adequately consider the availability of the ICRP in its determination of undue hardship under the totality of the **[*24]** circumstances. As noted above, the totality of the circumstances test requires the **bankruptcy** court to consider "any other relevant facts and circumstances" unique to the particular case, such as the debtor's ability to repay her loans. HN12 Although courts applying the totality of the circumstances test have treated the ICRP differently, the weight of authority is to treat the ICRP as one of many factors to consider in evaluating the totality of the debtor's circumstances. [16] Thus, a debtor's eligibility to participate in the ICRP may be considered by the court when applying the totality of the circumstances test, but it is not determinative. See In re Kelly, 312 B.R. at 206. As set forth below, we conclude that the **bankruptcy** court properly considered the Debtor's eligibility for the ICRP as part of its examination of the totality of the circumstances.

FOOTNOTES

16 See, e.g., In re Denittis, 362 B.R. at 64 ; see also Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 782 (8th Cir. 2009) ; Cheney v. Educ. Credit Mgmt. Corp. (In re Cheney), 280 B.R. 648 (N.D. Iowa 2002) ; Walker v. Sallie Mae Serv. Corp. (In re Walker), 427 B.R. 471, 486-87 (B.A.P. 8th Cir. 2010) ; Lee v. Regions Bank Student Loans (In re

Lee), 352 B.R. 91, 95 (B.A.P. 8th Cir. 2006) ; **[*25]** Vargas v. Educ. Credit Mgmt. Corp. (In re Vargas), 2010 Bankr. LEXIS 63, *12-13 (Bankr. C.D. Ill. Jan. 12, 2010) ; Booth v. U.S. (In re Booth), 410 B.R. 672, 675-76 (Bankr. E.D. Wash. 2009) ; Halverson v. U.S. Dep't of Educ. (In re Halverson), 401 B.R. 378 (Bankr. D. Minn. 2009) ; Collins v. Educ. Credit Mgmt. Corp. (In re Collins), 376 B.R. 708, 716 (Bankr. D. Minn. 2007) ; Wilkinson-Bell v. Educ. Credit Mgmt. Corp. (In re Wilkinson-Bell), 2007 Bankr. LEXIS 1052, *16 (Bankr. C.D. Ill. Apr. 7, 2007) .

HN13 The Ford Program allows student loans to be consolidated and payments on the consolidated loan to be adjusted based on a formula that takes into account poverty guidelines and a debtor's adjusted gross income. See 34 C.F.R. § 685.100, et seq. One of the consolidation options under the Ford Program is the ICRP. See 34 C.F.R. §§ 685.208 - 685.209. Under the ICRP, an eligible debtor's annual loan payment is generally equal to 20 percent of the difference between his or her adjusted gross income and the federal poverty guidelines for the debtor's family size, regardless of the amount of unpaid student loan debt. 34 C.F.R. § 685.209. Repayments are made monthly. 34 C.F.R. § 685.208(k). ICRP payments **[*26]** are recalculated annually based on changes to the debtor's reported household adjusted gross income. 34 C.F.R. § 685.209. Unpaid interest is capitalized until the outstanding principal is ten percent greater than the original principal amount. 34 C.F.R. § 685.209(c)(5). If the borrower has not repaid the loan at the end of 25 years, the unpaid portion of the loan is cancelled. 34 C.F.R. § 685.209(c)(4)(i).

HN14 Courts considering the ICRP as a factor under the totality of the circumstances test evaluate both the benefits and drawbacks of the program for the individual debtor within his or her unique circumstances. Brooks v. Educ. Credit Mgmt. Corp. (In re Brooks), 406 B.R. 382, 393 (Bankr. D. Minn. 2009). Although these courts acknowledge that the ICRP reduces the immediate debt burden of the student loan debtor, they are often concerned about the longer term debt and tax consequences of the program. They recognize that, although it may be appropriate to consider whether a debtor has pursued her options under the ICRP, participation in that program may not be appropriate for some debtors because of the impact of the negative amortization of the debt over time when payments are not made and **[*27]** the tax implications arising after the debt is cancelled. Because of these considerations, the ICRP may be beneficial for a borrower whose inability to pay is temporary and whose financial situation is expected to improve significantly in the future. See In re Vargas, 2010 Bankr. LEXIS 63, at *12-13. Where no significant improvement is anticipated, however, such programs may be detrimental to the borrower's long-term financial health. See id.; see also In re Wilkinson-Bell, 2007 Bankr. LEXIS 1052, at *16.

Central to this analysis is the idea that because forgiveness of any unpaid debt under the ICRP may result in a taxable event, the debtor who participates in the ICRP simply exchanges a nondischargeable student loan debt for a nondischargeable tax debt. Such an exchange of debt provides little or no relief to debtors. See Thomsen v. Dep't of Educ. (In re Thomsen), 234 B.R. 506, 514 (Bankr. D. Mont. 1999); see also In re Booth, 410 B.R. at 675-76; Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani), 311 B.R. 496, 509 (Bankr. N.D. Ill. 2004), aff'd, 320 B.R. 357 (N.D. Ill. 2005); but see In re Brunell, 356 B.R. at 580-81 (holding that "[t]o the extent that the Debtor satisfies the requirements **[*28]** for

participation in the Ford program, any tax liability based on the forgiven balance at that time is discharged."). For example, in In re Booth, the **bankruptcy** court stated:

Application of the ICRP does not result in a discharge of the debt nor relieve the debtor from personal liability on the debt. Further action may, and will, be taken to collect the obligation, even if that action is simply requiring the debtor to provide annual financial information to the Department of Education. The ICRP does not grant a discharge, but lapse of a period as long as 25 years may result in cancellation or forgiveness of the debt. There is no provision in the regulation for "partial" cancellation or forgiveness of the obligation. Unlike a discharge, cancellation or forgiveness of a debt results in a tax liability. As interest accrues during the 25 years or lesser repayment period, the amount of debt cancelled will be quite large. The resulting tax liability would not be subject to discharge in a later **bankruptcy** proceeding.

The focus of the ICRP is on deferral, not discharge, of debt. This is the antithesis of a fresh start. Congress has provided **bankruptcy** debtors relief which is not provided in **[*29]** the ICRP regulations. Compliance with ICRP regulations will not result in the same relief which can be granted by the courts under 11 U.S.C. § 523(a)(8).

410 B.R. at 675-76. In addition, many of these courts are concerned that the ICRP allows the Department of Education to substitute its administrative determination regarding undue hardship for the **bankruptcy** judge's statutorily mandated discretion under § 523(a)(8). See id.; see also In re Durrani, 311 B.R. at 509.

ECMC presented undisputed evidence that its loans to the Debtor were eligible for the ICRP. Based on the Debtor's adjusted gross income at the time of trial, the **bankruptcy** court found that her monthly ICRP payments would be $0.00. In its decision after remand, the **bankruptcy** court acknowledged that the Debtor was aware of the ICRP and her eligibility to participate, but stated that the fact that the Debtor would not be required to repay her student loan under the ICRP did not mandate a finding that her failure to participate in the program prevented a discharge of the debt. [17] Acknowledging both the potential for significant tax liabilities under the ICRP and its concern that finding failure to participate in a zero payment **[*30]** ICRP is per se lack of good faith would be an abdication of the **bankruptcy** court's responsibility to determine dischargeability of student loans, it ultimately concluded that:

. . . shackling the Debtor to the ICRP would be . . . a pointless exercise. Although her current payments under the ICRP would be zero, interest would continue to accrue despite the fact that the Debtor's chances of ever repaying any portion of the loan are virtually non-existent. The Debtor is now 65 years old, has failed to pass the Massachusetts bar examination three times. She testified she has no plans to retake the exam, which is reasonable in light of her testimony that she lacks the funds to do so, has not come within "striking distance" of passing, and importantly had an adverse physical reaction during the third examination whereby she almost fainted. Moreover, as set forth in this Court's Memorandum of Decision, the Debtor has attempted unsuccessfully to find employment as a secretary and has sought to publish a novel. These efforts demonstrate her good faith despite her reluctance to be forced into the Ford Program. Nor are circumstances likely to improve for the Debtor. But for the ability to live **[*31]** in the den of her father's home, the Debtor, without some sort of financial aid, could easily become homeless. In view of her age and work history, her prospects for a better financial future are dim. To subject her to a meaningless repayment plan when she clearly does not have the ability to repay these student loans now or in the foreseeable future is not required by 11 U.S.C. § 523(a)(8) and is inconsistent with this Court's role as the adjudicator of undue hardship.

2010 Bankr. LEXIS 71, at *5-6.

FOOTNOTES

17 There are courts that, despite following the Brunner test, have held that forgoing enrollment in the ICRP is a factor to consider in determining whether a debt is excepted from discharge under § 523(a)(8) , but that the failure to participate is not per se indicative of bad faith and is not outcome determinative. See, e.g., Barrett v. Educ. Credit Mgmt. Corp., 487 F.3d 353 (6th Cir. 2007) ; Mosley v. Educ. Credit Mgmt. Corp., 494 F.3d 1320 (11th Cir. 2007) .

ECMC argues that the **bankruptcy** court failed to comply with the district court's directives for remand. We disagree. Significantly, the district court did not adopt a per se rule that the availability of a zero payment ICRP should automatically **[*32]** result in a finding of nondischargeability. In its decision, the district court held that "[t]he decision whether to discharge [a student loan] in a case where the debtor is eligible but declines to participate in the ICRP must be the result of an individualized analysis in which the ICRP is given weight but for which no particular outcome is prescribed." 421 B.R. at 37. Thus, although the district court held that the **bankruptcy** court is obligated to consider the Debtor's eligibility for participation in the ICRP, it also acknowledged that eligibility alone did not mandate a particular outcome in the undue hardship analysis. Id. The district court concluded, therefore, that the ICRP must be considered as a factor in the undue hardship analysis and remanded the case to the **bankruptcy** court for proceedings to do so. Id.

On remand, the **bankruptcy** court clearly stated that, despite the Debtor's eligibility for the Ford Program, her ability to repay the debt was unrealistic in light of her age, inability to pass the Massachusetts bar examination, difficulty finding employment, and other burdens. These circumstances are amply supported by the record and are appropriate factors to be considered **[*33]** under the totality of the circumstances test. Thus, we conclude that the **bankruptcy** court adequately considered the Debtor's decision to forego enrollment in the ICRP as a factor within the totality of the circumstances.

III. The Debtor's Work Experience and Age

ECMC argues that the **bankruptcy** court erred in its legal conclusions regarding the Debtor's work experience and her age. Although ECMC purports to challenge the **bankruptcy** court's legal conclusions regarding these issues, it essentially restates the arguments it made in the district court regarding the **bankruptcy** court's factual findings. The district court concluded that the **bankruptcy** court's factual findings were not clearly erroneous and, therefore, there were no factual issues before the **bankruptcy** court on remand nor before the Panel in this appeal. See Ellis v. U.S., 313 F.3d at 646. [18]

FOOTNOTES

18 We agree with the district court's conclusion that "[t]he record shows a pattern of gradually decreasing employability followed by prolonged unemployment, despite a broad

and vigorous job search and increasing education and work experience." 421 B.R. at 33 .

CONCLUSION

As set forth above, the Panel concludes that the **bankruptcy** court did **[*34]** not err in its legal conclusions after remand regarding the weight that the Debtor's eligibility to participate in the ICRP should have in the undue hardship analysis, as well as its conclusion that the totality of the circumstances warranted a finding of undue hardship. Therefore, we **AFFIRM**.

CONCUR BY: Haines

CONCUR

Haines, Chief U.S. Bankruptcy Appellate Panel Judge, concurring.

I agree with the majority's conclusion that the judgment of the **bankruptcy** court should be affirmed; I write separately for several reasons.

The majority concludes that the "totality of the circumstances" test is the proper measure of "undue hardship" for determining the dischargeability of student loan obligations under § 523(a)(8). It goes on to assay the correctness of the **bankruptcy** court's determination exclusively under the totality of the circumstances model. The determination of the test to be applied to determine dischargeability is, pure and simple, a question of law, reviewed *de novo*. Abboud v. The Ground Round, Inc. (In re The Ground Round, Inc.), 482 F.3d 15, 17 (1st Cir. 2007). We review the **bankruptcy** court's conclusion of undue hardship as the determination of a mixed question of law and fact. Lorenz v. Am. Educ. Services/Pa. Higher Educ. Assistance Agency (In re Lorenz), 337 B.R. 423, 429 (B.A.P. 1st Cir. 2006). **[*35]** On the "sliding scale" that applies to review of such questions, a determination of undue hardship falls toward the legal/ policy end of the spectrum, calling for *de novo* review, as well. Id.

I have no quarrel with the majority's conclusion that the debtor demonstrated undue hardship and, therefore, that her student loans should be discharged. This case, however, does not call for choosing between the totality of the circumstances test and the "Brunner" test, [19] as employing either test would result in affirmance. The majority's rejection of the Brunner test is unnecessary to resolution of this appeal and, therefore, unwarranted. I am no fan of Brunner. [20] The majority's criticisms of it are well-taken. I am disinclined to enshrine the majority's legal determination as a holding when it is of no consequence to this case.

FOOTNOTES

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

(hereafter "Brunner").

20 See In re Lorenz, 337 B.R. at 432 ; Kopf v. Dep't of Educ. (In re Kopf), 245 B.R. 731, 741 (Bankr. D. Me. 2000) .

Having lost below under the trial court's careful consideration of the totality of the circumstances touching on the debtor's case, the appellant begs us **[*36]** to "adopt" Brunner. But we need not respond (either "yes" or, as here, "no") when the answer is of no moment.

Having withstood one appellate assault, the **bankruptcy** court's factual findings are fixed. They include:

• "[G]iven the Debtor's lack of recent work history, narrow work experience, failure to pass the bar exam, age, unsuccessful attempts to find employment in a variety of fields, and unsuccessful attempts to sell a novel and acquire a patent, the Debtor had no reasonably reliable financial resources other than [. . .] Social Security payments." [21]

FOOTNOTES

21 Supra at 4.

• "[I]f the Debtor participated in the Ford Program, her current financial status would result in her owing no monthly payments for her student loans." [22]

FOOTNOTES

22 Supra at 4.

• "But for the ability to live in the den of her father's home, the Debtor, without some sort of financial aid, could easily become homeless. In view of her age and work history, her prospects for a better financial future are dim." [23]

FOOTNOTES

23 Bronsdon v. Educ. Credit Mgmt. Corp. (In re Bronsdon), 2010 Bankr. LEXIS 71, at *6

(Bankr. D. Mass. Jan 8, 2010) ; Educ. Credit Mgmt. Corp v. Bronsdon (In re Bronsdon), 421 B.R. 27, 33 (D. Mass. 2009) (affirming the **bankruptcy** **[*37]** court's finding that Bronsdon would not be able to obtain employment in the future).

Taken together, these findings provide no basis to conclude that this debtor will ever have the financial resources to payoff (or even pay down) her student loan, on *any* terms.

One must ask, then, how could the failure to enroll in a program that would - as far as the judicial eye can see - require the debtor to pay *nothing*, be either a circumstance cutting against discharging the loan under the "totality" test or a lack of "good faith efforts" to pay under Brunner? Under either test, the court below was being asked to deny discharge of the loans on what basis? It could only be on the possibility that the debtor might win the lottery or that some equally improbable instance of financial good fortune could strike. Need it be said that, if such were a sufficient basis to deny discharge of a student loan, the prospect of ever discharging a student loan pursuant to § 523(a)(8) would become fantasy?

Furthermore, taking this case as the one that requires a choice between the totality of the circumstances test and Brunner credits a perverse application of the Brunner model. The Brunner court was concerned about **[*38]** debtors who resorted to **bankruptcy** and sought to discharge student loans without first making a good faith attempt at repayment. [24] Flipping the test's historical "good faith effort to repay" prong into the future is a misapplication. [25] And in cases like this one, courts would no longer inquire whether a debtor could repay a student loan without undue hardship (as the statute asks). Instead, they would be required to consider whether: (1) when there exists no reasonable possibility of payment; and (2) there exists a program that would require no payment, discharge of student loans must be denied because the debtor cannot satisfy Brunner's "good faith" prong ... because the debtor has not enrolled in the program?

FOOTNOTES

24 Brunner. 831 F.2d at 397 ; see Cazenovia College v. Renshaw (In re Renshaw), 222 F.3d 82, 87 (2d Cir. 2000) ("Congress enacted §523(a)(8) because there was evidence of an increasing abuse of the **bankruptcy** process that threatened the viability of educational loan programs and harm to future students as well as taxpayers"); United Student Aid Funds v. Pena (In re Pena), 155 F.3d 1108, 1111 (9th Cir. 1998) (" Section 523(a)(8) was a response to 'a rising incidence of consumer **[*39]** **bankruptcies** of

former students motivated primarily to avoid payment of education loan debts'"); Andrews Univ. v. Merchant (In re Merchant), 958 F.2d 738, 740 (6th Cir. 1992) ("The legislative history of the 11 U.S.C. § 523(a)(8) teaches us that the exclusion of education loans from the discharge provisions was designed to remedy an abuse by students, who immediately upon graduation, filed petition for **bankruptcy** and obtained a discharge of their educational loans.").

25 See, e.g., In re Kopf, 245 B.R. 731 ; Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004) ("Courts should base their estimation of a debtor's prospects on specific articulable facts, not unfounded optimism."); Wilson v. Educ. Credit Mgmt. Corp. (In re Wilson), 2002 Bankr. LEXIS 1743, 2002 WL 32155401, *4 (Bankr. E.D. Va. Jun. 25, 2002) ("Good faith effort also requires 'the debtor to have made payments when he or she was in a position to make such payments.'") (quoting Lohr v. Sallie Mae (In re Lohr), 252 B.R. 84, 89 (Bankr. E.D. Va. 2000)) ; Maulin v. Salliemae (In re Maulin), 190 B.R. 153, 156 (Bankr. W.D.N.Y. 1995) ("[T]he demonstration of good faith does not necessarily command a history of payment. It does require a **[*40]** history of effort to achieve repayment . . . Relevant proof may . . . include a history of some payment, the propitious use of deferments and the energetic exploration of employment options.").

Given that the choice of test makes no difference in this case, and that to make the unnecessary choice here can only contribute to the confusion surrounding undue hardship analysis, I am left to concur in the majority's conclusion without joining it on the path it has taken to reach it.