Chapter 13
Office of the Chapter 13 Trustee—Akron Office
Keith L. Rucinski—Trustee

# Chapter 13 Quarterly Newsletter
# September 2019

## 1. New Interest Rate

Effective September 18, 2019, the prime rate for the United States is 5.00%.

Pursuant to Administrative Order Nos. 17-2 and 18-5, the standard risk factor for the Northern District of Ohio, Akron location, is 2.00%.

The prime rate plus the risk factor is the standard interest rate for Chapter 13 plans. That rate is now 7.00% for cases confirmed on or after September 18, 2019.

Please remember that if the creditor asks for a lesser interest rate than 7.00%, Administrative Order No. 18-5 allows counsel to amend their plan to the interest rate requested by the creditor.

## 2. Mortgage Companies not Filing Claims

For those counsel who represent mortgage companies, it is imperative that their clients understand that they are bound by the bar date, the same as all other creditors. Therefore, mortgage lenders must file a claim within 70 days of the petition filing date.

Generally, there is a handful of outstanding cases in which the mortgage creditor has not filed a proof of claim and will not receive funds even though the debtor is in compliance with the plan and making timely plan payments.

Rule 3002 bars the mortgage creditor from filing a claim beyond the bar date; however, pursuant to Rule 3004, the debtor can file a claim beyond the bar date. The debtor generally has 30 days beyond the bar date to file a proof of claim on behalf of the creditor. If the debtor needs additional time to file a claim beyond those 30 days, the debtor must request and receive Court permission pursuant to Rule 3004.

## 3. Car registrations are needed for the 341 meeting

During the 341 meeting, it is often noted that the debtors auto insurance lists various vehicles which are not listed in the plan or schedules. Generally, the answer supplied by the debtor is that these cars belong to someone other than the debtor although they are on the debtor's insurance.

Lately there has been an increase in the number of vehicles on the Debtors insurance that are not disclosed in the plan. Therefore, if the Debtor(s) has auto insurance on a car that the Debtor(s) claims does not belong to the Debtor(s), the Debtor(s) must either provide the Trustee with a copy of the car title for that car or a copy of the current car registration which reflects the car is not titled in the Debtor(s) name.

### 4. HOA's and Form Plan Section 3.1

Please note that when the debtor is seeking to pay HOA fee arrearages or current HOA fees on a conduit basis, the HOA creditor should be listed in section 3.1 of the form plan.

HOA fees are similar to property taxes in that they are in rem and attach to the property which is generally the debtor's residence; and therefore, it is appropriate to disclose HOA fees in section 3.1 and note whether or not any portion of those will be paid through the plan or will continue to be paid by the debtor directly.

### 5. Section 2.5 of the Form Plan

Please note that Section 2.5 of the form plan provides a space for counsel to put the estimated payments the debtor is to make into the Chapter 13 plan.

This section should generally be the amount of the plan payments multiplied by the debtor's applicable commitment period.

This section is generally only an estimate and is useful information for the debtor. Additionally, some counsel have advised that this section must be completed in order for their software to provide the feasibility worksheet at the end of the plan.

As this is number is generally an estimate for informational purposes only, please note that going forward the Chapter 13 office will not adjourn confirmation with respect to amounts in 2.5.

Generally, counsel have the following options with respect to Section 2.5:

A. Leave the section blank;
B. Provide a reasonable estimate of payment the debtor is to make into the plan.

### 6. 341 Documentation

From time to time it becomes an issue that the Chapter 13 office is not timely receiving 341 documentation. Many counsel feel they can just bring the documentation to the 341 meeting or submit it electronically the day before the scheduled meeting.

The problem with submitting items electronically the day before the 341 meeting is that the portal system requires one day to upload the information. Items submitted a day before the 341 meeting cannot be reviewed in time for the 341 meeting.

The Akron Chapter 13 office requests that items for the 341 meeting be submitted for review no later than the Friday before the 341 meeting.

The Chapter 13 office is trying to avoid the scenario of having counsel and their client reappear multiple times at the 341 meeting. However, when documentation is not submitted timely, a full review of said documentation prior to the 341 meeting cannot be completed and both counsel and their client may be rescheduled for a later date to allow a review of the appropriate documentation.

Please find attached to this newsletter the standard letter that the Chapter 13 office sends to debtors as it reflects the relevant information which is necessary prior to the 341 meeting.

### 7. Removing Information from the 341 Documentation

Please note that effective October 1, 2019, the Akron Chapter 13 Office will no longer accept paper copies at the 341 meeting. At this time, most counsel use the electronic portal system to submit documentation, and those efforts are appreciated.

A few counsel still like to bring paper copies to the 341 meeting and those copies are not timely (see number 6 above). While in the past paper copies were accepted as a courtesy, that time has now passed. Paper copies will result in the 341 meeting be adjourned so that counsel may submit those items electronically to the Chapter 13 office.

Please remember when submitting documents through the portal system, the following personal information should be removed from the Debtor(s) tax returns:

All social security numbers.
All names of minor children.
All bank routing numbers.

This information should also be removed from any other documentation being submitted to the Chapter 13 office.

If counsel has questions on how to submit items electronically through the portal system, please contact ehoffert@ch13akron.com.

### 8. Plan Payoffs and Sale of Real Estate (Exempt Funds)

Many times, in Chapter 13 the debtors sell real property which is often their residence and is subject to the homestead exemption. The standard order used reflects that all funds, after payment of applicable mortgages and property taxes, should be paid into the Chapter 13 plan.

Please remember that when the debtor is paying with exempt funds, counsel will want to draft the order so that only the funds necessary to fund the Chapter 13 plan are paid into the plan.

All funds paid into the Chapter 13 plan are subject to the trustee administration fee pursuant to 28 USC § 586. Therefore, if the debtor is using exempt funds and only requires $10,000 to pay off the plan, the debtor should not be submitting anything over $10,000 into the plan.

The Chapter 13 office can provide an audited payoff provided that counsel submits a request for a payoff timely.

### 9. Personal Financial Management Course

In October 2018, the Chapter 13 Office in Akron completed 10 years of providing an in-person Personal Financial Management Course so that Debtor(s) had an opportunity to take the required course in order to earn a discharge.

Over the years, nearly 4,500 Debtor(s) took the in-person Personal Financial Management Course sponsored by the Chapter 13 Office.

Over the last decade, most Debtor(s) have migrated to taking the Personal Financial Management Course on-line.

The Chapter 13 office will continue to sponsor an on-line Personal Financial Management Course through the Trustee Education Network. Information regarding the online program is available on the Chapter 13 website at www.chapter13info.com. There is no charge to take the course online for Chapter 13 Debtor(s) who have filed in Akron, Ohio.

Please also find attached to this newsletter, a flyer for the on-line course, that counsel may share with their clients in Chapter 13 cases.

### 10. Paying Student Loan Income Driven Repayment Program Through Chapter 13 Plan

Please find attached to this newsletter a copy of a motion and agreed order which allows the Debtor(s) to make their income driven repayment program for student loans through the Chapter 13 plan.

Paying the student loan income driven repayment program through the Chapter 13 plan has gained popularity in other areas of the country and has been requested by some local counsel. The attached motion and agreed order require various information regarding the Debtor(s) student loan and the income driven repayment program terms. The Debtor(s) would be responsible for making all payments under the income driven repayment program until the Chapter 13 plan is confirmed; once the plan is confirmed, those payments are made through the Chapter 13 plan.

Counsel who have advocated for the payment of student loan repayment programs through a Chapter 13 plan have indicated that they prefer the record keeping which is

available to Chapter 13 Debtor(s) regarding their Chapter 13 plan payments and their payments to creditors.

While the motion and agreed order require various information about the Debtor(s) specific student loans, the actual terms of the agreed order should not be altered as they have been approved nationally.

When filing a motion and agreed order it is necessary to include the following on the service list: the United States Department of Justice in Washington DC, the local United States Attorney, the United States Department of Education in Washington DC, the holder of the student loan claim, and the notice address on the proof of claim filed by the holder of the student loan.

Assistant US Attorney Suzana Koch, has indicated that if counsel have any questions regarding the use of the agreed order that they may contact her at suzana.koch@usdoj.gov.

### 11. Discharging a Portion of Student Loans

In re Swafford, 2019 Bankr. LEXIS 2098, 2019 WL 3026974

Debtors Joshua and Krystal Swafford are married and have three dependent children. Joshua is employed and earns approximately $4,125 per month before taxes; he is unlikely to get a promotion anytime soon. Krystal has either been unemployed or worked part-time as a waitress since the birth of their first child. Debtors list their expenses as approximately $3,500 per month. Joshua owes on one student loan to ECMC with a principal of $45,270.27; one student loan to DOE with a principal of $17,050.31; and six separate student loans to Aspire of various amounts totaling over $70,000. Krystal has one student loan with the DOE with a principal of $17,471.69. Mr. Swafford earned a bachelor’s degree in psychology and earned $32,000 annually. He and his wife both decided to enroll in a nursing program at Southeastern Community College. Both of the Swaffords obtained loans from the DOE for tuition but ultimately both failed an introductory level courses and they each withdrew from the program. The debtors filed chapter 7 bankruptcy in the Northern District of Iowa and brought an adversary proceeding to determine their student loans to be dischargeable based on undue hardship.

The Debtors claimed that continuing to pay the student loans would cause them an "undue hardship" and sought to discharge all the student loans. Multiple student loan creditors claimed that discharge of Debtors' student loans is unnecessary. Creditors argued there is no undue hardship because Debtors are eligible for Income Based Repayment (IBR) plans, can cut non-essential expenses, and have a relatively long and capable future working life.

The bankruptcy court held that all but $23,900 of $154,000.00 in student loans were dischargeable. The Eighth Circuit uses a "totality of the circumstances" test for

determining whether there is "undue hardship". This differs from the majority of circuits, which have adopted what is known as the Brunner test. Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987). The Brunner test imposes a higher burden, requiring a debtor to show that repaying her student loans would force her and her dependents below a "minimal standard of living". In re Long, 322 F. 3d at 554 (citing Brunner). Under the "totality of the circumstances" test, however, debtors must prove, by a preponderance of the evidence, that continuing to be obligated to their student loans would impose an undue hardship. Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009). The Court evaluated three factors when deciding whether the discharge of a student loan is appropriate: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances. The Court reasoned that with the debtor husband as the only working member of the household, there simply would not be enough disposable income for the debtors to be expected to pay all of the student loan obligations. If the debtors' student loans had been consolidated, potentially all of the student loans may have been dischargeable.

### 12. No Discharge of Student Loans

Thomas v. Dep't of Educ. (In re Thomas), 2019 U.S. App. LEXIS 22584

Vera Frances Thomas filed a Chapter 7 bankruptcy case in 2017 at the age of 60. Ms. Thomas suffers from diabetic neuropathy, a degenerative condition that causes pain in her lower extremities. Ms. Thomas is now unemployed and subsists on a combination of public assistance and private charity. In February 2012, however, she had worked for eight years at a call center in Southeastern Virginia and was earning $11.40 per hour with benefits. That year, Ms. Thomas decided to enroll at a local community college to improve her career prospects (she had a high school diploma, but no higher education credits). She obtained two $3,500 loans through the Department of Education, the first on February 14, 2012 and the second on September 21, 2012 to finance her first two semesters of courses. Ms. Thomas did not return for a third semester, and her loans went into repayment in December 2013. In spring 2014, she made payments of $41.24 and $41.61 on the loans.

Ms. Thomas's health began to decline significantly in 2014 when she was diagnosed with diabetic neuropathy. The condition, which often reduces circulation in patients' lower extremities, caused muscle weakness, numbness, and pain in her legs and feet after prolonged standing. She obtained work with Perfumania, then Whataburger, and finally UPS. But each job required her to be on her feet, and she could not maintain these positions. Since quitting UPS in 2017, Ms. Thomas has not obtained employment that comports with her need for sedentary work.

Unable to make payments on her student loans and other significant debts, Ms. Thomas filed Chapter 7 bankruptcy in Dallas and received a general discharge of her debts. Seeking a discharge of her student loan debt as well, Ms. Thomas initiated an adversary complaint in bankruptcy court against the Department of Education. The bankruptcy

court found that the debtor did not meet her burden of showing undue hardship under 11 U.S.C. § 523(a)(8). The debtor appealed the judgment to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the bankruptcy court's judgment. The Appeals Court held that student loans may not be discharged unless repayment would pose intolerable difficulties on the debtor, Ms. Thomas. The Court noted several proposals in Congress attempting to make student loans dischargeable and indicated that would be the proper arena for the discussion of student loan dischargability. The fact that Ms. Thomas had quit her previous job indicated to the court that the possibility existed she could find more sedentary employment elsewhere.

**Standard 341 Meeting Letter**

Phone: (330) 762-6335
Fax: (330) 762-7072
Web: www.chapter13info.com

# Office Of
# The Chapter 13 Trustee
Keith L Rucinski, Trustee

One Cascade Plaza
Suite 2020
Akron, OH 44308

September 27, 2019

CASE NO.

HEARING:

LOCATION: John F. Seiberling U.S.
Suite B3-61
Courthouse 2 South Main Street
Akron OH, 44308
(For driving directions please visit www.chapter13info.com)

**Free course-Please see enclosed flyer for Financial Management Course necessary to complete the Chapter 13 program. You should take the course prior to the 341 meeting.**

Dear ,

Please note you are required to bring the following to your 341 First Meeting of Creditors.

1. Photo identification (one of the below forms of identification)
   - Valid driver's license
   - Federal or state issued identification

2. Proof of social security number
   - Social Security Card
   - W-2 or 1099 tax statements
   - Insurance cards with social security number

   Tax Returns and Passports do not provide proof of social security number.

**You are required to provide the following documents to your attorney at least ten (10) days prior to your 341 First Meeting of Creditors. Your attorney is responsible for delivering these documents to the Chapter 13 Office ten (10) days prior to your meeting. Failing to supply these documents can result in dismissal of your case and the reinstatement of state court garnishments and foreclosures.**

1. The last two years' federal tax returns that you have filed. Please submit all pages of individual, corporate and business returns and W-2's.

2. Your most current pay stub that has year-to-date information.

3. Last two months' bank statements.
    - If you do your banking through the internet, a printed copy of the online bank statement is acceptable. You must provide copies of all bank accounts that you have (savings, checking, investment accounts, etc.).

4. If you have rental properties, you must provide copies of your lease agreements with your tenants or a written statement that states the amount of rent that you receive and the name and address of your tenants.

5. Complete copies of homeowner's insurance or renter's insurance.

6. Complete copies of active automobile insurance that contains a listing of all vehicles that are insured.

7. Copy of your most recent mortgage statement that shows the balance due on on your mortgage.
    - When claiming interest on your federal tax return, the bank will issue a federal form 1098 that contains the mortgage balance information. Please bring this form or other documentation which shows the balance due on your mortgage.

8. If you are self-employed, you must provide the following information:
    - A balance sheet that shows the assets and liabilities of your business.
    - A profit and loss projection statement (income statement) that supports the income that you have listed on your bankruptcy petition.

****Even though you have given these items to your attorney, you are still required to bring copies of the above items with you to your 341 Meeting of Creditors for the Trustee to keep.**

Prior to your 341 meeting, you should review your bankruptcy plan and schedules so that you are familiar with them. You should also visit our website at www.chapter13info.com to learn more about the Chapter 13 program.

You need to arrive at the John F. Seiberling Courthouse (2 South Main Street Akron OH, 44308) 30 minutes prior to your hearing. You must come to Suite B3-61 to check in and verify that all of your documents have been received. Afterwards, you will be directed to a waiting area where you will watch an educational video and complete a questionnaire so that the Trustee will be better able to understand your plan.

Thank you for your attention to this matter.

Chapter 13 Office

cc:

# Personal Financial Management Course

# THIS COURSE IS REQUIRED TO EARN YOUR DISCHARGE !

## Online Chapter 13 Bankruptcy Course
## Finally Financial Freedom!

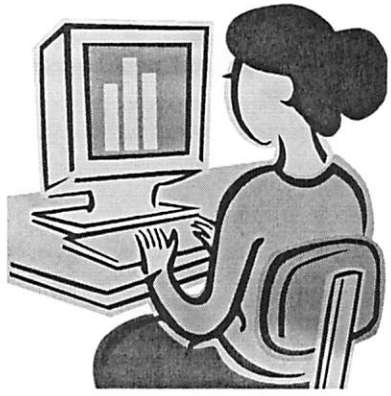
** The Trustees' Education Network (TEN) – an affiliate of the National Association of Chapter 13 Trustees – has created an online financial management course for the benefit and financial education of Chapter 13 debtors. This course is approved by the United States Trustee Program. **

# THIS COURSE IS FREE!

***THIS COURSE IS ABLE TO BE COMPLETED PRIOR TO YOUR 341 HEARING WITH THE TRUSTEE****

**SIGN UP ONLINE AT WWW.13CLASS.COM**

***WHAT YOU WILL NEED TO SIGN UP***



- Unique Trustee Identifier Number
  - **TEN13010**
- Bankruptcy Case Number
- Your full Name "exactly" as shown on bankruptcy petition
- A valid email address (each debtor will need a separate email address)
- Your bankruptcy Schedules A/B, D, and E/F for Lesson 1 and Schedules I and J for Lesson 3.

You must complete the entire course (all lessons and quizzes) to receive a Certificate of Completion from the Trustees' Education Network. Once you complete all coursework, the Trustees' Education Network will send a Certificate of Completion to you and to your Bankruptcy Court.

***Course satisfies legal requirements for debtors' Certificate of Completion and to gain a discharge of their bankruptcy case.*

**Other course providers may charge you a fee for this course.*

Motion to Pay Student Loan
IBR through Chapter 13 Plan

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Agreed Order to Pay Student Loan
IBR through Chapter 13 Plan

**IN THE UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**

| | | |
|---|---|---|
| IN RE: | ) | CHAPTER 13 |
| | ) | CASE NO. |
| | ) | |
| | ) | |
| | ) | |
| DEBTOR(S) | ) | ALAN M. KOSCHIK |
| | ) | BANKRUPTCY JUDGE |
| | ) | |
| | ) | MOTION TO PAY STUDENT LOAN |
| | ) | INCOME DRIVEN REPAYMENT |
| | ) | THROUGH CHAPTER 13 PLAN |

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Now comes the Debtor(s), in this Chapter 13 Plan, and hereby moves this Court for an order to allow the Debtor(s) to continue to make their student loan payments inside the Chapter 13 Plan.

1. The Debtor(s) filed a Chapter 13 Plan on or about _____.
2. The Debtor (s) with the student loan is _____.
3. Prior to filing Chapter 13, the Debtor(s) had entered an income driven repayment plan for their student loan payments with the US Department of Education.
4. The Debtor(s) is in compliance and not in default with the income driven repayment requirements.
5. The Debtor(s) current monthly income driven repayment is in the amount of $0.00.
6. The Debtor(s) is moving this Court to allow the Debtor(s) to pay the income driven repayment plan for the student loan through the Chapter 13 Plan.
7. Provided that the Debtor(s) remains current in payment(s) into his Chapter 13 Plan, the Debtor(s) is seeking an order to deem all payments through the Plan by the Chapter 13 Trustee with regard to the income driven repayment plan as timely. The timing of the Trustee's disbursement is not relevant in this determination as all Trustee payments would be deemed timely, and the Debtor(s) would be in compliance with the income driven repayment plan.

WHEREFORE, the debtor hereby moves this Court for an order to allow the Debtor(s) to pay his/her student loan income driven repayments through the Chapter 13 Plan and to deem all payments made by the Trustee to be timely under the terms of the income driven repayment plan.

Respectfully submitted,

Debtor(s) Counsel
Ohio Reg. No. 0063137
Address
City, State, ZIP
Tel
Fax
Email

CERTIFICATE OF SERVICE

I hereby certify that on _____, 2019, a copy of the foregoing was sent via Regular Mail to:

Debtor Name
Address
City, State, ZIP

U.S. Department of Justice – Washington D.C.

U.S. Department of Education

Loan Holder for the Student Loan

Notice Address on proof of claim

via ECF:

Debtor's Attorney, Esquire (via ECF at_____)
Suzana K. Koch, Assistant United States Attorney (via ECF at suzana.koch@usdoj.gov)
Office of the US Trustee
Chapter 13 Trustee

_____

**THE UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**

**IN RE:**

| | | |
|---|---|---|
| | ) | CHAPTER 13 |
| | ) | CASE NO: |
| | ) | |
| Debtor(s) | ) | ALAN M. KOSCHIK |
| | ) | BANKRUPTCY JUDGE |
| | ) | |
| | ) | **AGREED ORDER ON PAYMENT OF** |
| | ) | **STUDENT LOANS IN AN IDR PLAN** |
| | ) | **DURING THE CHAPTER 13 PLAN** |

1) Student Loan Debt Nondischargeable - In accordance with 11 U.S.C. § 523(a)(8), this Chapter 13 plan of reorganization ("Chapter 13 Plan") cannot and does not provide for a discharge, in whole or in part, of the Debtor's federal student loan debt authorized pursuant to Title IV of the Higher Education Act of 1965, as amended ("Federal Student Loan(s)").

2) Identification of Federal Student Loan Debt:

a) Only Federal Student Loans that are currently in an income-driven repayment ("IDR") plan, or which Debtor is eligible to repay under an IDR plan during the pendency of this Chapter 13 case, are listed in subsection (2)(b), below. Debtor could owe other student loan obligations. The special provisions contained in this section 3.1 of the Chapter 13 Plan only apply to the Federal Student Loans listed in subsection (2)(b), below.

b) As of [Insert date bankruptcy petition was filed], the Debtor's Federal Student Loan debt includes the following Title IV Student Loans:

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Title IV Loan Holder  Date Loan Obtained  Type of Loan (Direct, FFEL, Subsidized, Unsubsidized)  Original Loan Amount

c) The Federal Student Loans identified in subsection (2)(b), above, are held by the United States Department of Education ("Education") and / or [insert here other Title IV Student Loan Holders if applicable], pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. 1070, et seq. Hereinafter, Education and other Title IV Student Loan Holders are referred to individually and collectively as "Title IV Loan Holder."

3) Federal Student Loans not in Default

As of [Insert date bankruptcy petition was filed], the Debtor is not in default, as defined in 34 CFR 682.200(b) or 685.102, as applicable, on any Federal Student Loans listed in subsection (2)(b) of this Section.

4) Proof of Claim

The Debtor affirms that a timely proof of claim has been filed with the Bankruptcy Court for each Federal Student Loan listed in subsection (2)(b) of this Section. If a Title IV Loan Holder has not filed a proof of claim for a Federal Student Loan listed by the Debtor in subsection 2(b), the Debtor will file a proof of claim for that Federal Student Loan within fifteen (15) days in advance of the date scheduled for the §1324 confirmation hearing on this Chapter 13 Plan. Such proof of claim is subject to later amendment by the Title IV Loan Holder

5) Continuation of Pre-Petition Federal Student Loan IDR Plan

a) During the course of this Chapter 13 bankruptcy case until its dismissal or closure, the Debtor may continue participating in the IDR plan in which the Debtor participated pre-petition and for which Debtor otherwise continues to be qualified as determined by the Title IV Loan Holder.

i) The Debtor's monthly IDR plan payment is, as of the date of Debtor's bankruptcy petition, $_____.

ii) The Debtor's monthly IDR plan payment is due to the Title IV Loan Holder on the date the Chapter 13 Trustee makes the monthly disbursement to creditors.

b) Debtor's Monthly Payments for Pre-Petition IDR Plan

i. Until confirmation of this Chapter 13 Plan, the Debtor will make full and timely IDR plan payments directly to the Title IV Loan Holder identified in subsection (2)(b) of this Section.

ii. In order for the Chapter 13 Trustee to transfer timely the Debtor's first post-confirmation payment on the IDR plan, the Debtor must remit that IDR plan payment to the Chapter 13 Trustee in advance of the first post-confirmation payment due date, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of those funds to the

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Title IV Loan Holder.

**iii. The Title IV Loan Holder will be paid through the Chapter 13 plan as provided in section 3.1 of the Debtor's Chapter 13 plan.**

iv. Following confirmation of this Chapter 13 Plan and in addition to the Debtor's scheduled Chapter 13 Plan payment to the Chapter 13 Trustee's office, the Debtor will remit to the Chapter 13 Trustee the monthly IDR plan payment. The Chapter 13 Trustee will transfer the IDR plan payment funds to the Title IV Loan Holder.

v. The Debtor must remit each post-confirmation IDR plan payment to the Chapter 13 Trustee in advance of the IDR payment due date, and in good funds (money order, bank check, TFS payment, or payroll deduction), so as not to delay the Chapter 13 Trustee's transfer of the IDR plan payment to the Title IV Loan Holder.

vi. If the Debtor does not timely or fully remit sufficient funds to the Chapter 13 Trustee for Debtor's monthly IDR plan payment, the Chapter 13 Trustee is not required or responsible to transfer funds to the Title IV Loan Holder from the Debtor's general bankruptcy estate for that monthly payment. The Chapter 13 Trustee is not responsible for the Debtor's late or missing IDR plan payments caused by Debtor's failure to remit funds to the Chapter 13 Trustee for transfer of the IDR plan payment by the Chapter 13 Trustee's office.

vii. The Title IV Loan Holder shall modify the Debtor's monthly IDR plan payment due-date to accommodate the Chapter 13 Trustee's disbursement schedule. All payments processed by the Chapter 13 Trustee shall be deemed timely, and the Debtor(s) will be in compliance with the income driven repayment plan.

viii. The Chapter 13 Trustee may request the Title IV Loan Holder establish an automated clearinghouse (ACH) account with the Chapter 13 Trustee's office for deposit of the Debtor's monthly IDR plan payment directly into the Title IV Loan Holder's account.

6) Waivers

a. Debtor expressly acknowledges and agrees that regarding an application for initial participation and/ or continuing participation in an IDR plan while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, and communications concerning the IDR plan by the Title IV Loan Holder, including but not limited to: determination of qualification for enrollment in an IDR plan; loan servicing; transmittal to the Debtor of monthly loan statements reflecting account balances and payments due; transmittal to the Debtor of other loan and plan documents; transmittal of correspondence (paper and electronic) to the Debtor; requests for documents or information from the Debtor; telephonic and live communications with the Debtor concerning the IDR plan application, payments, or balances due; transmittal to the Debtor of IDR participation documentation; payment information; notices of late payment due and delinquency; default prevention activities; and other administrative communications and actions concerning the Debtor's IDR plan.

b. Debtor expressly waives any and all causes of action and claims against

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the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) with regard to and in consideration of the benefits of enrollment and participation in an IDR plan.

7) Annual Certification of Income and Family Size

Pursuant to 34 CFR 685.209, 34 CFR 685.221, or 34 CFR 682.215, as applicable, the Debtor shall annually certify (or as otherwise required by the Title IV Loan Holder) the Debtor's income and family size, and shall notify the Chapter 13 Trustee of any adjustment (increase or decrease) to the Debtor's monthly IDR plan payment resulting from annual certification.

a. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open, Debtor waives application of the automatic stay provisions of 11 U.S.C. § 362(a) to all loan servicing, administrative actions, communications, and determinations concerning the certification of income and family size taken or effected during and for the certification process by the Title IV Loan Holder, including but not limited to: administrative communications and actions from the Title IV Loan Holder for the purpose of initiating certification; requests for documentation from the Debtor; determination of qualification for participation; and any action or communication listed in subsection (6) above, which is incorporated herein by reference.

b. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of the automatic stay under 11 U.S.C. § 362(a) associated with the IDR plan certification process, in consideration of the voluntary participation of and benefits to the Debtor of continued participation in an IDR plan.

c. If Debtor's annual certification of income and family size for an IDR plan results in changes to the Debtor's required monthly IDR plan payment amount, the Debtor will notify the Chapter 13 Trustee within seven (7) days of Debtor's receipt of notice from the Title IV Loan Holder of the revised monthly IDR plan payment amount. Either the Debtor or the Chapter 13 Trustee may file an 11 U.S.C. §1329(a) motion to modify this Chapter 13 plan to reflect the Debtor's revised monthly IDR plan payment.

d. If the Debtor fails to satisfy the requirements for annual certification for continued participation in the IDR plan, the Title IV Loan Holder will recalculate the monthly repayment amount according to the requirements of the IDR program.

(i) Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder's recalculation of the Debtor's repayment amount does not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

(ii) Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged

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violation of the automatic stay under 11 U.S.C. § 362(a) with regard to the recalculation of Debtor's Federal Student Loan repayment obligation while this Chapter 13 bankruptcy case is open.

8) Discontinuation of Participation in IDR

a. If during the course of this Chapter 13 case the Debtor no longer desires to participate in the IDR plan and seeks administrative forbearance status on the Federal Student Loans identified in subsection (2)(b) of this Section, the Debtor must contact the Title IV Loan Holder in writing by letter to inform the Title IV Loan Holder of this decision.

b. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan, Debtor shall contact and inform the Title IV Loan Holder in writing by letter. Based on the Debtor's information, the Title IV Loan Holder will place the Federal Student Loan into an appropriate status, such as administrative forbearance, and will stay collection action until after this Chapter 13 case is closed.

c. If during the course of this Chapter 13 case the Debtor ceases making payments on the Federal Student Loan without notice to the Title IV Loan Holder, Debtor will incur a delinquency and may default on the Federal Student Loan as defined in CFR 34 CFR 682.200(b) and 685.102.

i. Debtor expressly acknowledges and agrees that while this Chapter 13 case is open the Title IV Loan Holder's administrative communication and actions on the defaulted debt, which are the routine administrative processes that occur upon delinquency and default on Federal Student Loans, do not violate the automatic stay provisions of 11 U.S.C. § 362(a) as set forth in subsections (6) and (8) of this Section.

ii. The Title IV Loan Holder's administrative communication and actions do not include any form of active debt collection.

d. Debtor expressly waives any and all causes of action and claims against the Title IV Loan Holder for any alleged violation of 11 U.S.C. § 362(a) with regard to the default status of Debtor's Federal Student Loan based on Debtor's non-payment while this Chapter 13 case is open, including communications with, correspondence to, or transmittal of statements to the Debtor, and telephonic and email contact with the Debtor, concerning and resulting from Debtor's Federal Student Loan default.

9) Opportunity for Title IV Loan Holder to Cure

Debtor first shall give notice to the Title IV Loan Holder in writing by letter of any alleged action by the Title IV Loan Holder concerning the Federal Student Loans and IDR plan that is contrary to the provisions of this Section and or 11 U.S.C. § 362(a). Debtor shall not institute any action in the Bankruptcy Court against the Title IV Loan Holder under 11 U.S.C. § 362(a) and (d) until after the Title IV Loan Holder

**CHAPTER 13**
Keith L Rucinski
Trustee
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(330) 762-6335
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has been given a reasonable opportunity to review, and, if appropriate, correct such actions. Notices provided to the Title IV Loan Holder under this subsection must include a description or identification of the actions that Debtor alleges to be in violation of this Section of the Chapter 13 Plan and/or 11 U.S.C. § 362(a).

10) Notice Any Notice required to be given to the Title IV Loan Holder under this Section must include the Debtors' name(s), Debtor's bankruptcy case number and Chapter 13 designation, and identification of the Federal Student Loans, and must be made in writing by letter to:

#####

Approved by:

_____
Chapter 13 Trustee

/s/_____
Attorney Name, Esquire
Ohio Reg. No. _____
Address
City, State, ZIP
Tel
Fax
email

_____
Suzana K. Koch
Assistant United States Attorney
Office of the United States Attorney
Northern District of Ohio
United States Court House
801 West Superior Ave., Suite 400
Cleveland, Ohio 44113

cc:

Debtor's Attorney, Esquire (ECF at _____)
Suzana K. Koch, Assistant United States Attorney (via ECF at suzana.koch@usdoj.gov)
Office of the UST
Chapter 13 Trustee

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In re Swafford, 2019 Bankr. LEXIS 2098, 2019 WL 3026974

# *In re Swafford*

United States Bankruptcy Court for the Northern District of Iowa

July 10, 2019, Decided

Chapter 7, Bankruptcy No. 15-01577-C, Adversary No. 16-09012

**Reporter**
2019 Bankr. LEXIS 2098 *; 2019 WL 3026974

IN RE: JOSHUA M. SWAFFORD KRYSTAL K. SWAFFORD, Debtors;JOSHUA M. SWAFFORD KRYSTAL K. SWAFFORD, Plaintiffs, vs. JOHN B. KING DEPARTMENT OF EDUCATION ASPIRE RESOURCES, INC., Defendants, EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Intervenor.

## Core Terms

student loan, expenses, undue hardship, loans, totality of the circumstances, DISCHARGED, obligations, plans, child support, garnishment, food, transportation, reductions, Repayment, household, resources, daughter, waitress, factors, imposes, monthly, repay

**Counsel:** **[*1]** For United States of America (ED), Creditor (1:15bk01577): US Attorney - CR, Cedar Rapids IA.

For Joshua M. Swafford, Debtor (1:15bk01577): Steven G. Klesner, Iowa City IA.

For Krystal K. Swafford, Joint Debtor (1:15bk01577): Steven G. Klesner, Iowa City IA.

Trustee (1:15bk01577): Sheryl Schnittjer, Delhi IA.

For Aspire Servicing Center, Defendant (1:16ap9012): Matthew C. McDermott, Des Moines IA.

For Educational Credit Management Corp., Intervenor (1:16ap9012): Brooke Suter Van Vliet, Brick Gentry P.C., West Des Moines IA.

For John B. King, Jr., Defendant (1:16ap9012): Martin McLaughlin, Stephanie Wright, United States Attorney's Office, Cedar Rapids IA; US Attorney - CR, Cedar Rapids IA.

For Steven W McCullough, Defendant (1:16ap9012): Matthew C. McDermott, Des Moines IA.

For Joshua M. Swafford, Krystal K. Swafford, Plaintiffs (1:16ap9012): Steven G. Klesner, Iowa City IA.

**Judges:** THAD J. COLLINS, CHIEF UNITED STATES BANKRUPTCY JUDGE.

**Opinion by:** THAD J. COLLINS

## Opinion

**RULING ON DISCHARGEABILITY OF STUDENT LOANS**

This matter came before the Court for hearing in Cedar Rapids, Iowa. Steven G. Klesner appeared for Debtors Joshua and Krystal Swafford ("Debtors"). Matthew C. McDermott appeared for creditor Aspire Resources, **[*2]** Inc. ("Aspire"). Brooke Suter Van Vliet appeared for creditor Educational Credit Management Corporation ("ECMC"). Martin J. McLaughlin appeared for John B. King and the United States Department of Education ("DOE"). Aspire, ECMC, and DOE are referred to collectively as "Creditors". This is a core proceeding under *28 U.S.C. §157(b)(2)(I)*.

**STATEMENT OF THE CASE**

Debtors Joshua and Krystal Swafford are married and have three dependent children. Joshua is employed and earns approximately $4,125 per month before taxes. Krystal has either been unemployed or worked part-time as a waitress since the birth of their first child. Debtors list their expenses as approximately $3,500 per month. Joshua owes on one student loan to ECMC with a principal of $45,270.27; one student loan to DOE with a principal of $17,050.31; and six separate student loans to Aspire of various amounts totaling over $70,000. Krystal has one student loan with the DOE with a principal of $17,471.69.

Debtors claim that continuing to pay the student loans would cause them an "undue hardship." Debtors seek to discharge all the student loans. Creditors claim that discharge of Debtors' student loans is unnecessary. Creditors argue there is no undue hardship **[*3]** because Debtors are eligible for Income Based Repayment (IBR) plans, can cut non-essential

expenses, and have a relatively long and capable future working life.

For the following reasons, the Court finds that under the "totality of the circumstances" test, Krystal's student loan imposes an undue hardship and is dischargeable, Joshua's student loans with ECMC and DOE impose an undue hardship and are therefore dischargeable, and the Court further finds that three of Joshua's six loans with Aspire would pose an undue hardship and therefore are dischargeable. The Court finds the three remaining loans Joshua has with Aspire do not impose an undue hardship and therefore are not discharged.

## STATEMENT OF THE FACTS

Debtors, who are in their mid-30s, live in Mediapolis, Iowa with their three dependent children. Currently, Krystal is unemployed and stays home with their children. Joshua has a job at US Gypsum he has held for over 5 years. He has received incremental promotions and related pay raises. His current income is approximately $49,500 before taxes and deductions. However, he is unlikely to get another promotion any time soon. In fact, he will probably receive a small pay cut if he switches **[*4]** to first shift so he can spend more time with the family. Krystal has worked minimally over the last seven to ten years, occasionally working part time as a waitress.

Joshua Swafford has a Bachelor's Degree in Psychology from Loras College. To fund his undergraduate education, he received student loans from Nelnet (ECMC's assignor) and Aspire (previously Iowa Student Loan). After obtaining his degree, Joshua worked for Optimae Life Services. He made between $32,000 and $36,000 annually. Joshua made relatively consistent payments on his student loans between 2008 and 2011.

In 2012, Joshua left Optimae. Both he and Krystal enrolled in a nursing program at Southeastern Community College. They thought they could both have better employment and make more money by completing the nursing degree. Both Krystal and Joshua borrowed from the DOE to finance this program. After completing their pre-requisites, however, each of them failed a required introductory level course. They both dropped out and did not pursue the program further because they would be required to restart the program and repeat the classes they have already taken—not simply the class they failed. After withdrawing from the nursing **[*5]** program, Joshua obtained his current job with US Gypsum. Krystal has stayed home with their children.

Their current mortgage is approximately $525 per month (though there is some discrepancy between the petition, exhibits, and bank statements surrounding this expense). They borrowed from Joshua's father for the down payment, and must repay that loan.

Krystal is unemployed and does the bulk of the childcare. Krystal has two additional children from before her marriage to Joshua. She owes child support for her daughter who lives in Iowa City and is with Debtors on alternating weekends. Joshua has paid Krystal's child support obligation for her daughter. Krystal also owes child support for her son who lives in Ohio. There are multiple issues surrounding custody of him and claims for child support and arrearages. This obligation has resulted in garnishments, which have taken a large portion of any paychecks she got from periodic waitressing jobs. She expects that this garnishment would continue if she got a new job. This makes any attempt by her to work more of a family and financial burden than real help. Given all these factors, Debtors believe it is nearly impossible to get out of this **[*6]** financial hole.

## CONCLUSIONS OF LAW AND ANALYSIS

Under the Bankruptcy Code, student loan debt is generally non-dischargeable 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)* (emphasis added). In creating this provision, Congress "intended to prevent recent graduates who were beginning lucrative careers and wanted to escape their student loan debt from doing so." *Long v. Educ. Credit Mgmt. Corp. (In re Long), 322 F.3d 549, 554 (8th Cir. 2003)*. The Code does not define "undue hardship" but courts have devised their own tests for meeting this standard. *Conway v. Nat'l Collegiate Trust (In re Conway), 495 B.R. 416, 419 (B.A.P. 8th Cir. 2013)*.

The Eighth Circuit uses a "totality of the circumstances" test for determining whether there is "undue hardship". This differs from the majority of circuits, which have adopted what is known as the Brunner test. *Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987)*. The Brunner test imposes a higher burden, requiring a debtor to show that repaying her student loans would force her and her dependents below a "minimal standard of living". *Long, 322 F. 3d at 554* (citing Brunner) (internal quotations omitted). *Conway, 495 B.R. at 419*; *Martin v. Great Lakes Higher Educ. Group (In re Martin), 584 B.R. 886, 891 (Bankr. N.D. Iowa 2018)*. Under the "totality of the circumstances" test, however, debtors must prove, by a preponderance of the evidence, that continuing to be obligated to their student loans would impose an undue hardship. *Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009)*.

The Court examines **[*7]** debtors' undue hardship argument "on the unique facts and circumstances that surround the particular bankruptcy." *Long, 322 F.3d at 554*. The Court evaluates three factors when deciding whether discharge is appropriate: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) the debtor's reasonable and necessary living expenses; and (3) any other relevant facts and circumstances." Id. The court will consider each of these factors in the analysis that follows.

After applying the totality of the circumstances test, the Court determines what loans, if any, can be discharged. The Eighth Circuit does not allow for partial discharge of a debtor's total student loan debt. *Martin, 584 B.R. at 890*; see also Thad Collins, Forging Middle Ground: Revision of Student Loan Debts in Bankruptcy as an Impetus to Amend *11 U.S.C. 523(a)(8)*, *75 Iowa. L. Rev. 733, 735-37 (1990)*. Where debtors have multiple student loan obligations, however, the Court is allowed to analyze each loan and "determine whether each loan, separately, imposes an undue hardship and may discharge some loans while declining to discharge others." *Martin, 584 B.R. at 890-91*.

The Debtors here have several, separate student loans. The Court will apply the three-part "totality of the circumstances" framework, and then **[*8]** determine whether or not repaying each loan imposes an undue hardship.

**A. Debtor's Past, Present, and Reasonably Reliable Future Financial Resources**

The first factor in the "totality of the circumstances" test is the Debtors' "past, present, and reasonably reliable future financial resources." *Long, 322 F.3d at 554*. Joshua and Krystal have separate student loan obligations. Thus, their income will be addressed separately. Joshua has a Bachelor's Degree in Psychology. He originally worked in psychology related employment with Optimae Life Services. He worked for Optimae for roughly 2 years. He has not since pursued any other employment in a field that requires his degree because of inadequate pay and the need to support his family.

Joshua attempted to go back to school and complete a nursing degree. While pursuing this degree, he worked part-time with Pizza Hut as a delivery driver. After completing his prerequisites during the first year of the program, he narrowly missed passing a required introductory class. In order for him to pursue that degree further, he would need to repeat the entire program, not just the one class he narrowly failed. Given his family obligations, he does not have the time or financial **[*9]** ability to do so. Upon withdrawing from the nursing program, Joshua obtained employment with US Gypsum and is still presently employed there. His employment at US Gypsum gives Joshua a higher income and more consistent schedule than his prior jobs.

Joshua began at US Gypsum in October of 2014. His job title was Operator 1. He has received occasional promotions from Operator 1 up through Operator 5 with corresponding pay increases. As an Operator 5, Joshua's monthly income is approximately $4,125 before taxes and deductions. It is roughly $2,800 per month after such deductions. Joshua testified that although it would be possible for him to get another promotion, it is unlikely. Not only would that require selection of him by the foreman, he would also need mechanical ability to work on and repair the relevant machines. Joshua does not have that skill set. Joshua also noted he, like many plant workers, is looking to move to first shift for the family-friendly hours. His current pay likely would decrease marginally if his application for first shift is approved.

Joshua's income is not likely to increase in any meaningful way for the foreseeable future. After taxes and withholdings, it currently **[*10]** covers most of the necessary household expenses but not much more. Joshua makes a few hundred dollars in extra income throughout the year as a sports announcer. These opportunities, however, are seasonal and very limited. While there may be some possibility for cost-of-living increases in his income, there will not be enough for Joshua to make significant payments on all eight loans. The likelihood of a minimum material increase in future income, particularly when compared to current expenses, thus weighs in favor of discharging one or more of Joshua's loans.

Krystal is not currently working. She stays at home providing childcare for her and Joshua's three children. Over the past six years, Krystal has had on and off employment as a waitress at minimum wage. She has generally received a net take-home pay (after garnishment for child support) of less than $200 for two weeks of work. Krystal has not completed any higher education. Like Joshua, she entered the nursing program but failed a key class, and would have to repeat the entire program, not just the one failed class, if she wanted to pursue employment in the field for which she borrowed for education.

With little experience other **[*11]** than waitressing, Krystal is unlikely to find a job that would pay her a wage that would add meaningfully to the family income. This is particularly true considering that for a substantial number of years into the future, the family will need to pay for child care if she works. Krystal will still be facing extensive garnishment for the child support owed toward her son. Even if Krystal were to return to work in the future, after all three children are of school age,

it is unlikely that she will generate enough income to pay garnishments and child support obligations and still have income left over to pay towards her student loan. These facts weigh in favor of discharging Krystal's loan.

**B. Debtor's Reasonable and Necessary Living Expenses**

Under the second factor of the "totality of the circumstances" test, the Court considers whether Debtor's expenses are reasonable and necessary. *Long, 322 F.3d at 554*. If "the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt-while still allowing for a minimal standard of living-then the debt should not be discharged." *Jesperson, 571 F.3d at 779 (8th Cir. 2009)* (quoting *Long, 322 F.3d at 554*).

Debtors live together with their daughters and they have shared household expenses. Joshua's **[*12]** income provides for the payment of their mortgage, utilities, food costs, transportation expenses, healthcare expenses, and entertainment/recreational expenses. Joshua testified that he tends to buy separate groceries/food, usually involving the Schwan's home delivery, apart from Krystal and the children. This separate buying is due to different food preferences.

Debtors have the following monthly expenses:

*Go to table1*

Joshua also pays Krystal's child support obligation of $245.00 per month for her daughter that lives with them on alternating weekends. Krystal owes additional child support for her son in Ohio. Debtors have had difficulty obtaining information about the monthly payment obligations and any arrearages, but those expenses exist.

Joshua conceded there could be some cost-savings if the household purchased joint groceries and did not use Schwan's deliveries. Debtors have eaten out frequently, sometimes rising to the cost of $400 in a particular month. Joshua **[*13]** also has a large cell phone expense, especially considering that Krystal does not have a cell phone. Debtors acknowledged their transportation expenses account for various repairs on one or more vehicles, but are not a regular monthly expense.

Debtors also admitted they attend and watch wrestling events for Joshua's brothers and one of the Swafford's daughters. Debtors use a portion of their income tax return to pay for hotel, food, and transportation expenses related to these wrestling events. Joshua also pays for a subscription streaming service to access various wrestling events.

While these additional expenses are not lavish or unreasonable per se, there are some opportunities for reduction. "Provided that total expenses remain minimal, the debtor is not expected or required to implement every conceivable cost-saving measure." *Limkemann v. U.S. Dep't. of Educ. (In re Limkemann), 314 B.R. 190, 195 (Bankr. N.D. Iowa 2004)*. Here, there is certainly room to reduce expenses that go beyond a minimal standard of living. The Court finds it would be fair to expect Debtors to do so here. This factor weighs against discharge of Debtors' entire student loan obligation. However, there is not enough opportunity for reduction to allow for payment of all eight loans.

**C. Other Relevant Facts [*14] and Circumstances**

The third factor of the "totality of the circumstances" test allows the Court to evaluate any other facts and circumstances relevant to determining undue hardship. *Long, 322 F.3d at 554*. The main factor the Creditors ask the Court to consider here is whether or not discharge is necessary in light of the Income Based Repayment (IBR) plans that are available to Debtors. *Martin, 584 B.R. at 893*. These IBR plan payments would be set at $0 based on Debtors' current income. Payments would only increase if their monthly income rises to a level allowing them to make payments in the future. Further, under an IBR plan, the total amount of the debt would be cancelled after 20-25 years, regardless of how much money Debtors had paid toward the loans. Creditors believe the availability of these plans cuts strongly against discharge here.

"[E]ligibility for income-based repayment plans is 'one factor in [the totality of the circumstances] analysis.'" *Martin, 584 B.R. at 893-94* (quoting *Fern v. FedLoan Servicing (In re Fern), 553 B.R. 362, 369-71 (Bankr. N.D. Iowa 2016)*, aff'd *563 B.R. 1 (B.A.P. 8th Cir. 2017)*. When considering IBR plans in the totality analysis, the Court considers whether the debtors can make significant payment under the plan and any additional hardships the plans may impose. *Fern, 553 B.R. at 369*. These additional hardships may include: the continuing growth of the **[*15]** total debt (due to deferral of payment) over the course of the plan, the debtor's ability to obtain future credit, and the mental and emotional impact on the debtor of the mounting debt. *Martin, 584 B.R. at 894*.

The current IBR payment on Debtors' loans would be $0. This fact, combined with the Court's earlier findings that Debtors' income is unlikely to increase in a meaningful way in the future, means that the overall student loan debts are likely to grow—not diminish—over time. The growth is likely to be faster than Debtors would be able to repay, even assuming they develop some ability to pay in the future. Debtors

testified that the knowledge of the mounting debt takes a heavy emotional and mental toll on them. They believe it has contributed, in part, to their recent marital instability. On balance, the availability of IBR plans here is not a significant factor in favor of finding against discharge.

The Court also must evaluate other unique factors of the "totality of the circumstances" test. Krystal's situation, for example, differs from Joshua's. Krystal's loan with DOE has a principal of $17,471.69. She got virtually no value or greater earning capacity from the education she received. Krystal's inconsistent **[*16]** work history and experience makes it unlikely that she will ever have any disposable income to pay towards an IBR plan, or otherwise reduce household expenses or the balance of her loan. This is particularly true considering that she has continuing child support obligations that cause her to face garnishment even if she were more consistently employed. If Krystal were ever to face the household expenses by herself, it is unlikely that she would be able to cover them, even if she were to obtain full-time employment. Based on these factors and others described previously, the Court finds that Krystal has established undue hardship and thus is entitled to discharge of her student loan with DOE.

The Court must also consider the "totality of the circumstances" as applied to each of the loans owed by Joshua: $45,270.27 with ECMC; $17,050.31 with DOE; and six loans with Aspire totaling almost $75,000, which at the time of trial were itemized by disbursement date as:

Go to table2

Unlike Krystal, Joshua has consistent employment and work history with a steady weekly **[*17]** income. His income though, is not likely to increase materially over time. The Court has concluded that there are reductions Debtors can reasonably make to food and entertainment related expenses. Thus, the Court finds Joshua could realistically have some disposable income to put toward repayment of student loans.

As noted above, in cases of multiple student loans, Courts must "determine whether each loan, separately, imposes an undue hardship and may discharge some loans while declining to discharge others." *Martin, 584 B.R. at 890-91*. The Court has applied this analysis and specifically finds the minimal level of disposable income Joshua can generate with spending reductions, will not cover eight different loans. The parties have offered no guidance on what the law requires or the facts warrant on picking the loans that do and do not present an undue hardship. The Court finds that Joshua, through income and cost reductions, can repay the three smallest loans (Dec. 11, 2016: $2661.51; Nov. 17, 2004: $10,760.60; and Sep. 24, 2002: $10,520.03) held by Aspire without imposing an undue hardship on him. Therefore, Joshua is not entitled to discharge of those three loans. Repayment of the other three loans with Aspire **[*18]** totaling over $50,000, however, would impose an undue hardship on Debtors and those loans are dischargeable.

The Court further concludes that the remaining two larger loans, held by ECMC and DOE, would also impose an undue hardship on Joshua. Those two loans, therefore, will also be discharged.

**CONCLUSION AND ORDER**

**WHEREFORE**, Krystal Swafford's student loan held by DOE is DISCHARGED.

**FURTHER**, Joshua Swafford's student loan held by DOE is DISCHARGED.

**FURTHER**, Joshua Swafford's student loan held by ECMC is DISCHARGED.

**FURTHER**, Joshua Swafford's student loans held by Aspire (Nov. 16, 2005: $23,451.55; Sep. 13, 2004: $12,469.97; and Oct. 3, 2003: $14,413.83) are DISCHARGED.

**FURTHER**, Joshua Swafford's student loans held by Aspire (Dec. 11, 2016: $2,661.51; Nov. 17, 2004: $10,760.60; and Sep. 24, 2002: $10,520.03) are NOT DISCHARGED.

**FURTHER**, judgment shall enter accordingly.

Dated and Entered:

July 10, 2019

/s/ Thad J. Collins

THAD J. COLLINS

CHIEF BANKRUPTCY JUDGE

**Table1 (*Return to related document text*)**

| | |
|---|---|
| Mortgage | $525.00 |
| Utilities | $729.00 (Including cell phone, Netflix, Sling TV, etc) |
| Food | $750.00 |
| Housekeeping | $75.00 |
| Personal Care | $75.00 |
| Miscellaneous | $200.00 (Including entertainment) |
| Transportation | $625.00 (Operating) |
| Transportation | $287.00 (Ownership) |

**Table1 (*Return to related document text*)**

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**Table2 (*Return to related document text*)**

| | | |
|---|---|---|
| Dec. 11, 2016 | - | $2,661.51 |
| Nov. 16, 2005 | - | $23,451.55 |
| Nov. 17, 2004 | - | $10,760.60 |
| Sep. 13, 2004 | - | $12,469.97 |
| Oct. 3, 2003 | - | $14,413.83 |
| Sep. 24, 2002 | - | $10,520.03 |

**Table2 (*Return to related document text*)**

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**End of Document**

Thomas v. Dep't of Educ. (In re Thomas), 2019 U.S. App. LEXIS 22584

# *Thomas v. United States Dep't of Educ. (In re Thomas)*

United States Bankruptcy Court for the Northern District of Texas, Dallas Division

December 8, 2017, Decided

Case No. 17-31060-hdh7, Adv. No. 17-03027-hdh

**Reporter**
581 B.R. 481 *; 2017 Bankr. LEXIS 4182 **

In re: Vera Frances Thomas, Debtor. Vera Frances Thomas, Plaintiff, v. U.S. Department of Education, Defendant.

**Subsequent History:** Affirmed by *Thomas v. Dep't of Educ. (In re Thomas), 2019 U.S. App. LEXIS 22584 (5th Cir. Tex., July 30, 2019)*

## Core Terms

Loans, undue hardship, student loan, repayment, total incapacity, circumstances, expenses, monthly, prong, repay, faith effort, second prong, discharged, diabetic, appears

## Case Summary

**Overview**
HOLDINGS: [1]-A 62-year-old woman who lost her job and declared Chapter 7 bankruptcy after she borrowed $7,000 to attend a community college did not meet her burden of showing she was eligible to have her student loan debt discharged under *11 U.S.C.S. § 523(a)(8)*; [2]-The U.S. Court of Appeals for the Fifth Circuit adopted the Brunner test for evaluating whether a debtor was eligible to have their student loan debt discharged, and although the debtor had no income she could use to repay her student loans and suffered from muscle weakness, pain, and numbness in her legs and feet after standing for extended periods of time due to diabetic neuropathy, she did not meet the second prong of the Brunner test, which required her to show that her condition prevented her from working and that her incapacity was likely to persist for a significant portion of the repayment period.

**Outcome**
The court found that the debtor had not met her burden of showing undue hardship under the controlling standard in the Fifth Circuit for interpreting and applying *§ 523(a)(8)*.

## LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Evidence > Burdens of Proof > Allocation

*HN1*[] **Exceptions to Discharge, Student Loans**

In order to discharge an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, a debtor must show that the debt, if excepted from discharge, would impose an undue hardship on the debtor and the debtor's dependents. "Undue hardship" is not defined by the Bankruptcy Code. However, the United States Court of Appeals for the Fifth Circuit held in U.S. Dept. of Educ. v. Gerhardt (In re Gerhardt) that a debtor seeking an "undue hardship" discharge of student loans under *11 U.S.C.S. § 523(a)(8)* must show: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans. This three-prong test is commonly referred to as the "Brunner test," and is the controlling law in the Fifth Circuit, as construed in Gerhardt. A debtor has burden of proof to show that all three prongs of the Brunner test have been met. If one prong of the Brunner test is not proven, a debtor's student loans cannot be discharged under an "undue hardship" theory.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Evidence > Burdens of Proof > Allocation

*HN2*[] **Exceptions to Discharge, Student Loans**

Under the first prong of the Brunner test, a debtor must establish that she cannot maintain a minimal standard of living if she is forced to repay her student loans. The first prong is satisfied if monthly expenses exceed monthly income.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

*HN3*[] **Exceptions to Discharge, Student Loans**

The second prong of the Brunner test requires a showing of "additional circumstances," which encompasses circumstances that were not present at the time a debtor applied for student loans or have since been exacerbated. In the Fifth Circuit, the second prong of the Brunner test is especially difficult to meet. The United States Court of Appeals for the Fifth Circuit has indicated that a showing of dire financial conditions is not enough—the circumstances must be outside the debtor's control and result in a "total incapacity" to pay debts now and into the future.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

*HN4*[] **Exceptions to Discharge, Student Loans**

The third prong of the Brunner test requires a debtor to have made good faith efforts to repay their student loans. The overarching inquiry is whether a debtor's default is the result of factors beyond his control. Specifically, courts consider a debtor's efforts to obtain employment, maximize income, and minimize expenses.

**Counsel: [**1]** For Vera Frances Thomas, Plaintiff (17-03027-hdh): Noah Mariano Schottenstein, LEAD ATTORNEY, Baker Botts, Dallas, TX.

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**Judges:** Harlin D. Hale, United States Bankruptcy Judge.

**Opinion by:** Harlin D. Hale

# Opinion

**[*482] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court has seen a number of actions in which debtors are trying to discharge their student loans. Not all of them have been meritorious. Many, however, have drawn a great deal of sympathy from this Court. Some appeared to satisfy the plain language of the statute, which merely requires that the debt, if excepted from discharge, would impose an "undue hardship" on the debtor and the debtor's dependents. Some would have satisfied the "totality of the circumstances" test adopted in other Circuits for determining whether the debt would impose an undue hardship. But none have satisfied the demanding standard adopted as controlling law in this Circuit. That is why, in fifteen **[**2]** years on the bench, the undersigned judge has never discharged a student loan over the objection of the lender. This case is no different.

On December 4, 2017, the Court held a trial on the *Complaint to Determine Undue Hardship Under 11 U.S.C. § 523(a)(8)* [Docket No. 1] (the "Complaint") filed by Vera Frances Thomas ("Ms. Thomas"). Through the Complaint, Ms. Thomas sought a determination that repayment of her student loans from the United States Department of Education (the "Department of Education") would impose an undue hardship and they may therefore be discharged under *11 U.S.C. § 523(a)(8)*.

The following are the Court's Findings of Fact and Conclusions of Law.[1] The Court has sympathy for Ms. Thomas's situation, but based on these Findings of Fact and Conclusions of Law, the Court determines that Ms. Thomas has not met her burden of showing undue hardship under the controlling standard in the Fifth Circuit for interpreting and applying *11 U.S.C. § 523(a)(8)*.

## I. JURISDICTION AND VENUE

[1] The following are the Court's Findings of Fact and Conclusions of Law, issued pursuant to *Rule 52 of the Federal Rules of Civil Procedure*, as made applicable in adversary proceedings by *Federal Rule of Bankruptcy Procedure 7052*. Any Finding of Fact that more properly should be construed as a Conclusion of Law shall be considered as such, and *vice versa*.

This Court has subject matter jurisdiction over this matter pursuant to *28 U.S.C. § 1334*. **[*483]** This adversary proceeding involves a core matter under *28 U.S.C. § 157(b)(2)(A)* and *(I)*, as the adversary proceeding involves a determination as to the dischargeability of a particular debt. Venue for this adversary **[**3]** proceeding is proper pursuant to *28 U.S.C. § 1409(a)*.

## II. FINDINGS OF FACT

The facts in this adversary case are not disputed. Ms. Thomas attended Thomas Nelson Community College during the Spring and Fall semesters of 2012. At the time, Ms. Thomas was fifty-seven years old. She financed a portion of these semesters through the William D. Ford Federal Direct Loan Program with the Department of Education. She obtained a loan of $3,500 on February 14, 2012, and another loan of $3,500 on September 21, 2012 (together, the "Loans").

The Loans with the Department of Education went into repayment status in December 2013. Ms. Thomas failed to make payments on the Loans as they became due and consequently was placed in default forbearance. She did make payments on the Loans in April 2014 in the amount of $41.24, and May 2014 in the amount of $41.61. These were the only payments made by Ms. Thomas on the Loans.

As of March 12, 2017, there was due and owing a principal sum of $7,110.87 and interest of $695.58. In total, Ms. Thomas's outstanding balance is $7,806.45, with interest accruing at $0.66 a day. Under an amortizing repayment plan, payments on the Loans would be approximately $77 a month. Ms. Thomas has never **[**4]** applied for a discharge with the Department of Education based on total disability, which would allow the Loans to be administratively discharged if Ms. Thomas could establish a disability and prove an inability to work any position. Nor has Ms. Thomas submitted an application for the Income Based Repayment Plan, which would allow Ms. Thomas to make payments of $0 per month as long as her income remains less than $15,930 a year. After 20 to 25 years, any balance on the student loans would be forgiven, but the amount of debt forgiveness could have tax implications because it would likely be recognized as taxable income under current law.

Ms. Thomas is now sixty-two years of age. She was diagnosed with diabetes in the mid-1980s and suffers from diabetic neuropathy. Ms. Thomas has managed her condition ever since she was diagnosed, but in 2014, Ms. Thomas's condition worsened. As a result of the diabetic neuropathy, Ms. Thomas began suffering from its common yet debilitating symptoms: muscle weakness, pain, and numbness in her legs and feet after standing for extended periods of time. She continues to manage her condition through a charitable program at a local hospital, but the symptoms **[**5]** persist, and no cure for diabetic neuropathy currently exists.

Notwithstanding the two semesters at college, Ms. Thomas only has a high school degree. From 2004 until 2016, she was employed as a full-time customer service representative. Despite the diabetic neuropathy, she was able to maintain this employment due to its sedentary nature. In 2015, her reported income on her Statement of Financial Affairs was $22,880. In September 2016, she was terminated for violating company policy by wearing headphones and listening to music during her lunch break, and her income according to her Statement of Financial Affairs for that year was $16,812. Post termination, Ms. Thomas worked at three different jobs, but was unable to sustain employment due to her medical condition.

On March 24, 2017, Ms. Thomas filed a **[*484]** petition for Chapter 7 bankruptcy.[2] She has remained unemployed for nearly a year since January 2017. Ms. Thomas concedes that she is able to perform a full-time sedentary position and continues to seek employment, but so far, the search has been to no avail. She currently has no income—the only income listed in her Schedule I is approximately $194 per month in food stamps. Her vehicle listed **[**6]** in Schedule A has been repossessed. The value of her personal assets is only $1,225 according to her Schedule B. Schedule J listed her monthly living expenses at $640, which included a $200 monthly rent contribution to her boyfriend, but circumstances have changed. Ms. Thomas lost the support of her boyfriend, currently faces an eviction notice, and has been forced to find a new residence. She also does not qualify for Medicaid or Medicare.

## III. CONCLUSIONS OF LAW

Ms. Thomas's Loans constitute "an educational . . . loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution" as provided by *11 U.S.C. § 523(a)(8)(A)(i)*. *HN1*[] In order to discharge such a debt, debtors must show that the debt, if excepted from discharge, would impose an "undue hardship" on the debtor and the debtor's dependents.

"Undue hardship" is not defined by the Bankruptcy Code. However, this Court is bound by Fifth Circuit precedent requiring a debtor seeking an "undue hardship" discharge of student loans under *section 523(a)(8)* to show:

[2] Case No. 17-31060 [Docket No. 1].

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents **[**7]** if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.

*United States Dept. of Educ. v. Gerhardt (In re Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003)* (citing *Brunner v. New York State Higher Educ. Services Corp., 831 F.2d 395, 396 (2d Cir. 1987)*). This three-prong test is commonly referred to as the *Brunner* test and is the controlling law in this Circuit as construed in *Gerhardt*. Ms. Thomas has the burden of proof to show that all three prongs of the *Brunner* test have been met. *Kettler v. Great Lakes Higher Educ. Serving Corp. (In re Kettler), 256 B.R. 719, 723 (Bankr. S.D. Tex. 2000)*. If one prong of the *Brunner* test is not proven, student loans cannot be discharged under an "undue hardship" theory.

***HN2***[↑] Under the first prong of *Brunner*, Ms. Thomas must establish that she cannot maintain a minimal standard of living for herself if she were forced to repay the Loans. The first prong is satisfied if monthly expenses exceed monthly income. *Gerhardt, 348 F.3d at 92*. According to Ms. Thomas's schedules, her monthly expenses, $640, clearly exceed her monthly income, $194 (in food stamps). It is also likely that her monthly expenses will increase in the immediate future; she lost the support of her boyfriend, and new living accommodations as a result of the notice of eviction could be financially **[**8]** burdensome. Ms. Thomas has satisfied the first prong of the *Brunner* test.

***HN3***[↑] The second prong of the *Brunner* test requires a showing of "additional circumstances," which encompasses circumstances that were not present at the time **[*485]** the debtor applied for the loans or have since been exacerbated. *Id. at 92*. In this Circuit, the second prong of the *Brunner* test is especially difficult to meet. *See id.* ("This second aspect of the [*Brunner*] test is meant to be a 'demanding requirement.'") (quoting *Brightful v. Pa. Higher Educ. Assistance Agency (In re Brightful), 267 F.3d 324, 328 (3d Cir. 2001)*). The Fifth Circuit has indicated that a showing of dire financial conditions is not enough—the circumstances must be outside the debtor's control and result in a "total incapacity" to pay debts now and into the future. *Id.*

The Court notes the taxing nature of the "total incapacity" requirement adopted by *Gerhardt*. Ms. Thomas conceded that she is unable to show she is completely incapable of any employment now or in the future, but urged the "total incapacity" showing is far too stringent, asking the Court to utilize a "realistic look" test in regards to the second prong of the *Brunner* test (as implemented by *Gerhardt*).[3] Ms. Thomas cited the Tenth Circuit's approach to the second prong of the *Brunner* test, whereby **[**9]** the court does take a "realistic look" at a debtor's financial circumstances and judges their prospects on "specific articulable facts, not unfounded optimism." *Educational Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1310 (10th Cir. 2004)*; *see also In re McMullin, 316 B.R. 70, 78 (Bankr. E.D. La. 2004)* (following *Polleys* and finding undue hardship where the debtor was gainfully employed as a truck driver, but suffered from debilitating and worsening medical conditions that limited future employment opportunities and earning potential). The court in *Polleys* stated, "although a permanent medical condition will certainly contribute to the unlikelihood of a debtor earning enough money to repay student loan debt, it is by no means necessary if the debtor's situation is already bleak." *356 F.3d at 1311*.

*Gerhardt,* specifically in regards to "total incapacity," appears to be a very high hurdle for debtors to clear, and this Court is bound by Fifth Circuit precedent. Ms. Thomas suggested that she does not meet the "total incapacity" standard as it is understood in *Gerhardt*, and this Court agrees. Accordingly, the second prong of the *Brunner* test is not met.

***HN4***[↑] The third prong of the *Brunner* test requires Ms. Thomas to have made good faith efforts to repay the Loans. The overarching inquiry is "whether the debtor's default **[**10]** is the result of factors beyond his control." *In re Gnahoua, No. 14-5020, 2016 Bankr. LEXIS 97, 2016 WL 1238831, at *2 (Bankr. N.D. Tex. Mar. 28, 2016)*. Specifically, courts consider a debtor's "efforts to obtain employment, maximize income, and minimize expenses." *Russ v. Tex. Guaranteed Student Loan Corp., (In re Russ), 365 B.R. 640, 645 (Bankr. N.D. Tex. 2007)*.

Here, evidence exists on both sides. It appears that Ms. Thomas made good faith efforts to gain employment and thus maximize income. Given the eviction, her age, and her health problems, it also appears she made good faith efforts toward minimizing expenses. Conversely, she only made two payments on the Loans. She also never applied for a discharge with the Department of Education based on total disability, nor did she submit an application for the Income Based Repayment Plan. Other Circuits have considered the failure to take advantage of such income contingent repayment plans in determining a debtor's good faith efforts to repay educational loans. *Alderete v. Educational Credit Mgmt. Corp. (In re Alderete), 412 F.3d 1200, 1206 **[*486]** (10th Cir. 2005)*; *see Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),*

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[3] *Plaintiff's Trial Brief*, at 11 [Docket No. 13].

*409 F.3d 677, 682 (6th Cir. 2005)*; *see* *Educational Credit Mgmt. Corp. v. Frushour (In re Frushour), 433 F.3d 393, 402-03 (4th Cir. 2005)*. However, given that Ms. Thomas did not satisfy the second prong of the *Brunner* test, this Court does not need to make a finding regarding good faith in this case.

## IV. FINAL THOUGHTS

Respectfully, and for the benefit of any reviewing court, this Court makes several observations. First, the *Gerhardt* test appears to the undersigned, and I suspect many other bankruptcy **[**11]** judges as well, an incredibly high burden, and a test harder to meet than the *Brunner* test due to the required finding of "total incapacity." For this specific reason—a necessary finding of "total incapacity"—this Court has not discharged a single student loan debt when the lender contested it.

Second, when considering a debtor's good faith efforts to repay, it is unclear in this Circuit what weight to give to the fact that a debtor, like Ms. Thomas, fails to participate in alternative repayment plans. This is most applicable in addressing the third prong of the *Brunner* test, and in this good faith analysis, most courts hold that such failure is only a factor to consider. The Fifth Circuit, as far as this Court can tell, has not ruled on the issue nor suggested a route for bankruptcy courts to follow.

As student loan discharge litigation appears to be an increasingly common aspect of a large number of consumer bankruptcy cases, guidance on the standard to apply, as well as the role of alternative repayment plans in the good faith analysis, would greatly aid bankruptcy courts in their decisions on these matters. Until then, this Court is still bound by the precedent established in *Gerhardt* ***[**12]*** . The Court sympathizes with Ms. Thomas and her situation, but Ms. Thomas did not meet the evidentiary burden to establish an "undue hardship" as this Court understands it to be in the Fifth Circuit. Therefore, Ms. Thomas's education loans cannot be discharged under *11 U.S.C. § 523(a)(8)*.

**The following constitutes the ruling of the court and has the force and effect therein described**.

**Signed December 8, 2017**

/s/ Harlin D. Hale

**United States Bankruptcy Judge**

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