IN THE UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
GREGORY A. MEYER and WENDY L. MEYER,	:	Case No. 90-01592-CH
Debtors.	:	Chapter 7
GREGORY A. MEYER and WENDY L. MEYER,	:	Adv. No. 0192
Plaintiffs,	:	
v.	:	
STUDENT LOAN MARKETING ASSOCIATION, STUDENT LOAN LIQUIDITY CORPORATION and UNIVERSITY ACCOUNTING SERVICES,	:	
Defendants,	:	
and	:	
IOWA COLLEGE STUDENT AID COMMISSION,	:	
Intervenor.	:	

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ORDER - DISCHARGEABILITY OF STUDENT LOAN DEBTS

The trial on the Complaint to Determine Dischargeability of Debt came on for hearing on April 2, 1991. James W. Mailander, Howard, Rutherford and Mailander, Attorneys at Law, appeared for the Plaintiff/Debtors; Lloyd J. Blaney, Dew and Blaney, Attorneys at Law, for the Defendant, Great Lakes Higher Education Corporation; David M. Engelbrecht,

Engelbrecht, Ackerman and Hassman, Attorneys at Law, for the Defendant, Wartburg College of Waverly, Iowa; and, Noel C. Hindt, Assistant Attorney General, State of Iowa, for the Intervenor, Iowa College Student Aid Commission. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. The parties have filed timely briefs and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The Court now enters its findings of fact and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS

1. An Order for Relief under Chapter 7 of the Bankruptcy Code was entered on June 14, 1990.

2. Debtors filed their complaint to determine dischargeability of student loan debts on September 21, 1990.

3. By order entered on October 24, 1990, the Iowa College Student Aid Commission (herein ICSAC) was permitted to intervene on behalf of the Defendant, Iowa Student Loan Liquidity Corporation.

4. ICSAC filed its answer and counterclaim. This counterclaim prays for judgment against the Plaintiff, Gregory A. Meyer, (herein Gregory) in the amount of $7,494.01, plus interest from November 2, 1990, at the rate of 9% per annum simple interest, and for costs, including reasonable

attorney's fees.

5. University Accounting Services is an agent for Wartburg College in servicing the student loan with Wartburg College. Plaintiffs have dismissed their claim against University Accounting Service and have conceded that Wartburg College is the real party in interest.

6. Great Lakes Higher Education Corporation (herein Great Lakes) is a Wisconsin corporation created by an act of the Wisconsin legislature to guarantee student loans.

7. Great Lakes is an assignee of the named Defendant, Student Loan Marketing Association, and Plaintiffs have conceded that Great Lakes is the real party in interest.

8. Great Lakes has filed a counterclaim praying for judgment against the Plaintiff, Wendy L. Meyer (herein Wendy) for $13,115.06, with interest and costs. It is agreed that as of June 14, 1990, the amount of this debt is $13,115.06.

9. Gregory is 29 years of age, birth date 5/16/62. He is in good health.

10. He graduated from Wartburg College, Waverly, Iowa, with a degree in business administration in 1985. His primary area of study was in marketing management.

11. Gregory received student loans from Wartburg College in the original principal sum of $3,200.00. As of October 19, 1990, there was a balance on this loan of $2,358.10 plus interest at the contract rate.

12. Wartburg College worked out a repayment plan for the

repayment of this loan. As of the time of filing, it was agreed that the payment of $5.00 per month would keep this debt current. This agreement is not to continue indefinitely but remains in effect at this time. Gregory made one $5.00 payment in April, 1990, but has made no other payments.

13. Gregory also received student loans which are currently held by ICSAC. The unpaid principal and interest balance due under these notes is $7,494.01 plus interest at 9% per annum from November 2, 1990.

14. Wendy is 30 years of age, birth date August 31, 1961. Wendy does have diabetes, but this disease does not prevent Wendy from reasonable activity although extreme physical activity is not permitted.

15. Gregory and Wendy are husband and wife having been married on September 5, 1982.

16. Wendy also graduated from Wartburg College with a degree in business administration in 1985.

17. Wendy received a guaranteed student loan and the debt owed to Great Lakes on the consolidated note made by Wendy on April 30, 1987 is $13,115.06, with interest at the rate of 9% per annum, as of June 14, 1990.

18. Gregory and Wendy have three children, to-wit: Tiffany Anne Meyer, B/D 7/28/83, age 8; Nathan Gregory Meyer, B/D 10/16/85, age 5; and, Ashley Alta Meyer, B/D 10/17/88, age 2. Tiffany is in the first grade; Nathan attends preschool; and Ashley remains at home. All the children are in good

health. However, a child requires speech therapy which is provided through the public school system.

19. Upon graduation from college Gregory worked as a cook in a Pizza Hut, Waverly, Iowa. He continued in this employment until January 1, 1986.

20. Gregory commenced operating Van's Chat & Chew Restaurant in Atlantic, Iowa, in April, 1986. This business operation was terminated on October 27, 1988, for financial reasons.

21. Gregory is now employed by Northern States Restaurant Systems, Inc., at the Bonanza Restaurant, Oskaloosa, Iowa. Gregory employs skills learned at Wartburg College in his present employment as an associate manager.

22. Gregory earned $20,193.63 in wages and bonus in the 1990 calendar year.

23. Gregory now earns $660.00 gross every two weeks. He has a net income every two weeks of $568.90.

24. During the first three months of 1991 Gregory earned a bonus averaging approximately $751.50 per month.

25. Gregory has opportunities for advancement with Northern States Restaurant Systems without additional education.

26. Wendy assisted Gregory with the bookkeeping at Van's Chat & Chew Restaurant. She learned her bookkeeping skills at Wartburg College. Other than that part time employment, Wendy has neither sought nor gained employment outside the home

since graduation from Wartburg. Wendy's last gainful employment was in May 1983, when she was employed by the Wartburg College Work Program. To date, Wendy's search for employment outside the home has consisted of looking at classified advertisements for office work. She has never made personal contact with a prospective employer or requested an interview.

27. Wendy is considering employment outside the home when the second child is in school full time.

28. Gregory and Wendy show a food bill of $450.00 per month. The family's meals at Bonanza are paid for if the family eats there.

29. In response to an interrogatory, Gregory and Wendy listed the following monthly bills: Telephone - $90.00; Cable TV - $27.00; Medicine - $120.00; Dance - $25.00; and Miscellaneous - $75.00.

30. Although Gregory has health insurance through his employer, and the family now qualifies for this benefit, Gregory has never submitted the bills for insulin for payment. A majority of this expense would be covered by insurance.

31. Gregory failed to pay the federal and state withholding taxes and FICA taxes ("trust fund" taxes) during the time he operated Van's Chat & Chew Restaurant. Debtors have scheduled $24,000.00 as a priority tax liability to the Internal Revenue Service. Debtors have scheduled $13,000.00 as a priority tax liability to the Iowa Department of Revenue

and Finance.

32. Debtors have paid approximately $2,000.00 on the student loan held by Great Lakes; approximately $1,500.00 on the student loan held by ICSAC; and approximately $800.00 to Wartburg College.

33. Gregory does have an I.R.A. through his employment with Bonanza. His employee contribution in 1990 was $760.32. This asset was not scheduled by Gregory.

CONCLUSIONS

At issue is the dischargeability of student loans pursuant to the undue hardship provisions of 11 U.S.C. § 523(a)(8). That statute in relevant part provides:

> (a) A discharge under section 727...does not discharge an individual debtor from any debt--
>
> (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless--
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> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents;

When a debtor brings a complaint to determine dischargeability under the undue hardship exception, the burden of proof is divided between the parties. The creditor

must first establish the existence of the debt, that it is owed to or insured or guaranteed by a governmental agency or a nonprofit institution of higher learning, and that it first became payable less than five years prior to the date the bankruptcy petition was filed. The burden then shifts to the debtor to prove undue hardship. In re D'Ettore, 106 B.R. 715, 717-18 (Bankr. M.D. Fla. 1989); see also Matter of Coleman, 98 B.R. 443, 447 (Bankr. S.D. Ind. 1989); In re Norman, 25 B.R. 545, 548 (Bankr. S.D. Cal. 1982). This divided burden of proof results from the fact that a "claim of 'undue hardship' is in the nature of an affirmative defense or an exception to the exception of such a debt from discharge." Coleman, 98 B.R. at 447.[1] In this case, it appears undisputed that the debtors' loan obligations are nondischargeable pursuant to § 523(a)(8), and the only issue remaining for disposition by the court is whether the debtors can prove repayment of the loans would inflict an "undue hardship."

The term "undue hardship" is not defined in the Code and each case ultimately rests on its own facts and the totality of the circumstances. In re Zobel, 80 B.R. 950, 952 (Bankr. N.D. Iowa 1986); In re Clay, 12 B.R. 251, 253 (Bankr. N.D. Iowa 1981) The Court is mindful of the unique nature of

[1]The Court is persuaded the "preponderance of the evidence" burden of proof used in dischargeability determinations, Grogan v. Garner, __ U.S. __, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991), also applies when a debtor seeks to prove an exception to the exception of a debt from discharge.

educational loans and legislative history which reflects Congress' concern that such loans not be easily discharged in bankruptcy.

> [E]ducational loans are different from most loans. They are made without business considerations, without security, without cosigners, and relying for repayment solely on the debtor's future increased income resulting from the education. In this sense, the loan is viewed as a mortgage on the debtor's future. In addition, there have been abuses of the system by those seeking freedom from educational debts without ever attempting to repay.

United States Dept. of Health and Human Services v. Smith, 807 F.2d 122, 125 (8th Cir. 1986) (quoting H.Rep. No. 595, 95th Cong., 2d Sess. 133, reprinted in 1978, U.S.C.C.A.N. 5963, 6094).

> Congress imposed the "undue hardship" requirement for discharge at least in part because government-granted or -insured educational loans are not strictly analogous to debts incurred in the consumer economy. The legislation creating the various student loan programs bars loan-granting institutions from applying more traditional standards for evaluating credit-worthiness; it also locks lenders into fixed and relatively low interest rates.

In re Frech, 62 B.R. 235, 243 (Bankr. D. Minn. 1986). In return for giving aid to individuals who represent poor credit risks, Congress has stripped these individuals of the refuge of bankruptcy in all but extreme cases. See In re Brunner, 46 B.R. 752, 756 (S.D. N.Y. 1985), aff'd 831 F.2d 395 (2nd Cir. 1987).

In In re Andrews, 661 F.2d 702 (8th Cir. 1981), the Eighth Circuit held a bankruptcy court must examine a debtor's

reasonable living expenses in making a § 523(a)(8)(B) "undue hardship" determination. Id. at 703. The Andrews decision also indicated a court should consider the severity of any illness or disease a debtor may have and whether it could require expensive treatment or adversely affect a debtor's ability to work.

An important consideration in an undue hardship case is a debtor's financial future. See Clay, 12 B.R. at 254. Various good faith factors which are also considered include a debtor's efforts to obtain employment, minimize expenses and maximize resources. Zobel, 80 B.R. at 952.

Section 523(a)(8)(B) requires a finding of "undue" hardship as opposed to the "garden variety" hardship commonly found in all bankruptcy cases. See Coleman 98 B.R. at 451. The very fact that a debtor has felt compelled to file bankruptcy is evidence of the present financial hardship he or she is enduring. A court must focus on whether the hardship is the result of exigent or exceptional circumstances beyond the debtor's control. See Coleman 98 B.R. at 454. For a court to do otherwise would subvert the clear intent of Congress.

> It would be illogical to believe that Congress would on one hand dole out money for student loans and then on the other hand guillotine that program by allowing the bankruptcy court to freely and with reckless abandon order the discharge of student loans without a strong showing of "undue hardship."

Id.

"Undue hardship" under § 523(a)(8) must be long-term and a court must find a certainty of hopelessness of repayment, not simply a present inability to fulfill a financial commitment. Frech, 62 B.R. at 243. A debtor's hardship must not be due to circumstances which are self-imposed. In re Boston, 119 B.R. 162, 165 (Bankr. W.D. Ark. 1990).

Courts have set forth numerous factors to be considered in determining if an undue hardship discharge is warranted. See D'Ettore, 106 B.R. at 718; Coleman, 98 B.R. at 448-49. After reviewing these factors, the Court reaches the following conclusions in this case:

- The education obtained through the loans has benefited Gregory in obtaining employment and enhances his future employment prospects.
- The medical condition of Wendy is not such that it prevents her from obtaining employment or precludes her from paying back the loans.
- The debtors' current financial situation is not necessarily long term or hopeless in nature. Wendy has presently chosen not to utilize her business degree. When she does obtain employment, the debtors should not find it unduly burdensome to pay their student loans.
- The debtors have not presently maximized their resources available for repayment of their debts: Wendy has not used her education to obtain employment; the debtors presently expend $450 a month on food (despite their

ability to dine free at Gregory's place of employment) and $25 a month to provide dance lessons for one of their children; and they have not submitted claims for insulin expenditures, a majority of which would be covered by their health insurance.

The failure to maximize available income and to eliminate unnecessary expenditures are factors the court must consider in making an "undue hardship" determination.

Under the circumstances of this case, the Court concludes any hardship the debtors will endure in repaying their student loans is not an "undue" hardship. The debtors have presently chosen not to fully utilize Wendy's education and she is unemployed. This decision has resulted in a tight budget for the debtors, but it clearly is not a factor beyond their control. The debtors' present situation is neither long term or hopeless in nature as should become apparent when the debtors do decide to maximize their potential resources by having both obtain employment.

ORDER

IT IS HEREBY ORDERED that the obligations owing the defendants are nondischargeable pursuant to § 523(a)(8). The following judgments shall be entered in light of the Defendant's counterclaims:

1) Judgment for Iowa Student College Aid Commission in

the amount of $7,494.01 plus interest from November 2, 1990, at the rate of 9% per annum simple interest; and

2) Judgment for Great Lakes Higher Education Corporation for $13,115.06 with interest of 7% as of June 14, 1990.

Dated this 21st day of January, 1992.

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RUSSELL J. HILL
U.S. Bankruptcy Judge