

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re:

MICHAEL E. HEDLUND,
Debtor.

MICHAEL E. HEDLUND,
Plaintiff,

Vs.

THE EDUCATION RESOURCES
INSTITUTE, INC.,
Defendant.

Case No. 03-6231-fra

EUGENE, OREGON
APRIL 25, 2011
1:34 p.m. TO 2:39 p.m.

ORAL ARGUMENT RE: REMAND

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE PHILIP H. BRANDT, Judge

APPEARANCES:

For the Debtor:

Keith Y. Boyd
MUHLHEIM BOYD LLP
88 East Broadway
Eugene, OR 97401

For The Education Resources
Institute Inc.:

Miles D. Monson
ANDERSON & MONSON, P.C.
Park Plaza West, Suite 460
10700 SW Beaverton-Hillsdale Hwy
Beaverton, OR 97005

Proceedings recorded by electronic sound technician, Julie
Wiskow; transcript produced by AVTranz, Inc.



1 THE CLERK: All rise. United States Bankruptcy Court
2 for the District of Oregon is now in session. Honorable Philip
3 Brandt presiding.

4 THE COURT: Please be seated. Good afternoon. I
5 have to tell you it looks a lot like Seattle out there.

6 MR. BOYD: Welcome to the rain.

7 THE COURT: Yes. So why don't we do appearances on
8 the record, please.

9 MR. BOYD: Your Honor, Keith Boyd representing
10 Michael Hedlund.

11 THE COURT: Okay.

12 MR. MONSON: And Miles Monson, Pennsylvania Higher
13 Education before you.

14 THE COURT: Great. Thank you. It's a little --
15 there is a somewhat puzzling situation I suspect for all
16 concerned. So let me start with a couple of observations, and
17 I think I might as well start by saying I'm not going to be
18 able to give you a ruling today. I'm going to want to think
19 about what I've heard and put it together, and then whether it
20 will be a written ruling or we'll call and coordinate some kind
21 of time for perhaps a phone hearing, I'm not sure, but we'll
22 try to get to that pretty soon.

23 And I don't think at this point there's any
24 particular need to go through the history. I will point out
25 one thing that may be a slight jurisdictional question. I'm

1 not going to say it's even a glitch at this point.

2 When you read the Ninth Circuit disposition, at one
3 point it looks like it's remanding to the -- directly to this
4 court and in another point it looks like it's intending to
5 remand to the BAP with the instructions then to remand it here,
6 and that may not trigger much in most folks, but having spent a
7 bunch of time working on the BAP I decided, well, I'll call and
8 find out.

9 They don't -- at least as of Friday -- didn't think
10 they'd ever heard of the ruling.

11 I don't think -- I think technically that's probably
12 what should have happened, remand to the BAP, then remand here.
13 I think that's in the larger scheme of things a non problem,
14 they can do a curative remand from the BAP if it turns out we
15 really need it, and we'll take care of that from this side.
16 You folks don't need to worry about it.

17 And either way you look at it it comes out the same
18 we're back to reviewing the record, making more detailed
19 findings and then making a determination on that.

20 And as I understand that, that entails reconsidering
21 all the evidence and considering the further argument and then
22 making new findings and as things come out, they come out.
23 We'll do a judgment that conceivably could be the same but
24 might be significantly different. One of the implications of
25 making the more detailed and necessary findings is the findings

1 might not support the earlier result.

2 I think that was pretty much all I had in mind as
3 general remarks. I kind of -- I don't know that we explicitly
4 said anything in the last hearing, but I somewhat assumed that
5 I would hear further argument from each of you and would
6 entertain that now if either of you want to do that.

7 Mr. Boyd?

8 MR. BOYD: Thank you, Your Honor. On behalf of
9 Mr. Hedlund, essentially what I understood the Court to say at
10 our last hearing was that you were going to review the evidence
11 as if you were the trial judge.

12 THE COURT: Right.

13 MR. BOYD: So I imagined that this hearing today
14 would essentially be our, for lack of a better term, closing
15 arguments.

16 THE COURT: Sort of a reclosing, right.

17 MR. BOYD: And so that's how I prepared for this, and
18 what I would like to do is just go through some of the
19 essential facts and then relate those to what I understand to
20 believe to be the appropriate law related to the Ninth
21 Circuit's application of the Brunner standards to the Pena
22 case, and move forward from there.

23 So for all practical purposes you've heard the
24 evidence that was presented through four witnesses, Mr. Hedlund
25 testified, Ms. Paula Pentz testified, and then two employees of

1 the juvenile department in Klamath County testified, Mr. Vest
2 and Mr. Golden, and that no witnesses were called on behalf of
3 the defendant.

4 Mr. Hedlund testified that he was born in Klamath
5 Falls, Oregon, he was 33 years old, attended school at Klamath
6 Union High School and attended the University of Oregon and
7 obtained a bachelor's degree in administration, business
8 administration.

9 After school he worked for a couple of years in a
10 warehouse and then decided to go to law school, and to finance
11 his education he took out a series of Stafford student loans.

12 There were two student loan lenders in the case. The
13 first one was --

14 THE COURT: TERI, T-E-R --

15 MR. BOYD: TERI, yeah, The Educational Resources
16 Institute and then -- and they held one loan, and the remainder
17 of the loans were held by Pennsylvania Higher Education
18 Assistance Agency, Mr. Monson's client.

19 They also obtained the assistance through -- he also
20 obtained assistance through school from his parents and he
21 worked both summers in law school as a legal intern making \$10
22 an hour, and I believe the testimony was that he worked for his
23 father who is an attorney in Klamath Falls.

24 THE COURT: He did that one year, and then for the
25 district attorney I thought the second summer?

1 MR. BOYD: I think that's right.

2 THE COURT: Yeah.

3 MR. BOYD: And then when he graduated, he took the
4 bar exam, and graduated, he worked for the district attorney's
5 office pending the results of the bar exam.

6 He graduated in the middle of his law school class in
7 May of 1987, prepared for the bar exam, took the exam in July
8 of 1977 (sic) and failed while he was working as an intern for
9 the DA's office. Sat for the exam again in February of 1998
10 and failed it again. At that time the district attorney's
11 office terminated his employment.

12 He then got a job working for the juvenile department
13 as a probation officer and prepared to take the bar exam a
14 third time in 1999, and we know the circumstances of that, he
15 prepared, he spent the money, he did the study, he drove to
16 Salem the night before and then the mishap and he did not make
17 it to the exam.

18 At some point in that process decided that he
19 probably wasn't going to take the exam again. We find that
20 then in the year 2000 he married, became a father, and decided
21 that the expense to take time off of work and to spent the
22 money to take the bar review course again with no assurance of
23 passing was not warranted given his family situation at that
24 time.

25 We also know that after graduation that he was -- his

1 first loan payments were to begin in 1998, and at that time he
2 was working in the DA's office making \$10 an hour, did not have
3 the income to be able to make a meaningful payment and so he
4 applied for and was granted extension of the grace period to
5 begin making those payments.

6 When those extensions were expired, again, didn't
7 have the income to be able to make the full payments that were
8 required, and did not make those. He at one point sought to
9 consolidate his loans and was told that he had a deadline for
10 making that application. He sent the application in, but as he
11 testified that that particular handler didn't receive it or
12 didn't know where it was. It was considered to be a default or
13 he failed to meet the deadline for that and was no longer
14 eligible for that.

15 Later he tried to consolidate, was told that he could
16 not do so unless his payments were current, and that was a
17 requirement of the income contingent repayment plan.

18 With regard to his ability to make payments or his
19 efforts to make payments, what we know he testified that he
20 received an inheritance from his grandmother about \$5,000. He
21 devoted some of that to general creditors and some of that to
22 making payments on his student loans, specifically PHEAA. The
23 defendant in this matter received \$954.72 from that inheritance
24 in September of 1999.

25 When he was told that he was ineligible for

1 consolidation. He was presented with a couple of different
2 options by PHEAA, one was to pay 10,000 up front and then 1,300
3 a month for ten months and then they would relook at the
4 situation and adjust his payments accordingly, or he could pay
5 off -- pay the loan off in the lump sum of approximately
6 \$80,000.

7 Of course he didn't have the wherewithal to do either
8 one of those. Had talked to them about maybe getting \$5,000 in
9 cash which he was going to borrow from his parents and then
10 negotiate a reasonable monthly payment, and his testimony was
11 that PHEAA rejected that offer.

12 So then in January of 2002 the defendant began
13 garnishing his wages at \$250 a month and he allowed that to
14 continue from January --

15 THE COURT: And this was some sort of an
16 administrative garnishment?

17 MR. BOYD: It was. It was. They had not sued him.
18 They went immediately to an administrative function that's
19 allowed under the rules, and I'm thinking back to 2003 during
20 the original testimony because the details I had don't cover
21 that.

22 THE COURT: Sure. I think that --

23 MR. BOYD: I don't think there was --

24 THE COURT: -- he said something to that --

25 MR. BOYD: -- nothing improper about that and so he

1 allowed that to continue for more than a year and they received
2 \$4,272.52 from his wages up through May of 2003.

3 At that point then the other student loan creditor
4 initiated collection action against him and garnished his bank
5 account obtaining \$1,100 which wiped out all of the money that
6 he had in that particular month and no means to provide for his
7 family. Came to see me, we filed a Chapter 7 bankruptcy in
8 June -- or in May and then in June filed this adversary
9 proceeding which was then tried in December of 2003.

10 We settled with TERI prior to the trial for an amount
11 of \$50 per month, and that was incorporated then into the
12 budget that was included as Schedule J in the Chapter 7
13 schedule so we filed it with the court.

14 THE COURT: And I don't recall that part of it, but
15 was there an outside -- \$50 a month for a finite period?

16 MR. BOYD: It was --

17 THE COURT: Or was there an amount set for the total?

18 MR. BOYD: The total debt to TERI is \$17,700 and it
19 was my recollection that the \$50 a month was for a finite
20 period of time. I believe it was 30 years, but right now I
21 don't remember that.

22 So the only issue at trial was the dischargeability
23 of the debt owed to Mr. Monson's client.

24 The evidence was that the debt was \$85,245.87 and the
25 interest rate was 4.22 percent per year or about \$3,600 a year

1 in interest that was accruing.

2 So Mr. Hedlund also testified that he had applied for
3 a County human resources manager position, interviewed for a
4 position with a company as its pension manager but didn't get
5 either one of those jobs. Looked for positions in other
6 juvenile probation departments in Oregon and Washington.
7 Checked out, was eligible for those, but when he looked at the
8 cost of living in those areas it was clear that he would do
9 better in his present position in Klamath County where the cost
10 of living was substantially less than Portland and southwest
11 Washington.

12 He makes \$19.17 an hour with Klamath County, works
13 full time, two or three days a month works overtime, and my
14 recollection is his testimony was that he doesn't get overtime
15 pay, but he gets comp time for that.

16 At time of trial he was a -- he'd been a juvenile
17 counselor for about -- a little over five years, was due one
18 more step increase in pay from 19.17 per hour to \$20.10 per
19 hour and after that then it would be cost of living increases
20 and the only other significant increase might come from
21 stepping into higher levels of management authority in the
22 Klamath County juvenile department.

23 The testimony we presented with regard to the
24 employees there clearly show that they were long term
25 employees, intended to stay, he would be going for their jobs

1 and that those would not be available for many years.
2 Considered his job in Klamath Falls to be a good job, the
3 testimony of Paula Pentz is that it's an excellent job.

4 THE COURT: And she's the employment counselor?

5 MR. BOYD: Yes, and I'll highlight a little bit more
6 about that in just a minute.

7 With regard to the family income, Mr. Hedlund
8 testified that his wife works part time one day a week at a
9 flower shop, \$8.50 an hour and they utilized babysitting from
10 his parents and grandparents to allow her to do that, and that
11 she could probably work more than one day a week and not
12 materially increase their babysitting expenses, and I think
13 that's a good summary of the testimony.

14 He has one vehicle, 14-year-old Ford Bronco, good to
15 have in Klamath Falls 4-wheel drive, but has 150,000 miles and
16 not one that he considers to be reliable transportation. It's
17 less than a mile -- or a little over a mile from his home to
18 work and that is a decent vehicle for him to get to and from
19 work, but felt that it was reasonably necessary for the family
20 to have a reliable vehicle so they leased a Honda Accord,
21 certainly not a luxury vehicle by anybody's imagination,
22 payments \$353 a month. That they use -- his wife uses for
23 transportation to around town and they use for their vacations
24 when they have some time that they can take off.

25 So the monthly expenses -- the monthly income at the

1 time was \$2,449, monthly expenses for \$2,500, a \$1 deficiency
2 to meet expenses or just about to break even.

3 At the time there was discussion of nonessential
4 expenses such as cell phones, cable TV, Internet access and a
5 gym membership which were paid -- which were part of the
6 2,400 -- excuse me, \$2,450.

7 They live in a small duplex owned by Mr. Hedlund's
8 parents and their rent of \$350 a month is lower than market
9 subsidized by the parent's to allow them to have a little nicer
10 place to stay, a little bit bigger, but they do anticipate
11 having additional children and that it's reasonably anticipated
12 that that rent expense is going to increase in the years to
13 come.

14 His testimony was that a two-bedroom apartment or
15 duplex would probably cost around \$600 a month. So they did
16 anticipate the rent going up from 350 to 600.

17 THE COURT: It looked to me, looking at Judge
18 Radcliffe's oral opinion, that he factored that into the
19 calculations when he arrived at how much would be discharged
20 because otherwise I had trouble figuring out the math.

21 MR. BOYD: I'm not positive that he did, but I think
22 that he did.

23 THE COURT: Okay.

24 MR. BOYD: The expert that we called was Paula Pentz
25 and she works for the Klamath County -- Klamath Lake employment

1 training institute -- a real mouthful. She's been there at the
2 employment training institute for over 16 years. She has a
3 degree in career counseling and had completed graduate level
4 courses in that, and Judge Radcliffe did rule that she was an
5 expert in her field and qualified to testify in the area of
6 future employment prospects in Oregon.

7 So she performed a career assessment on Mr. Hedlund,
8 found out he's capable guy, and utilizing the skills that he
9 has in a reasonably practical way working for the Klamath
10 juvenile department, she reviewed the market for jobs that he
11 might be qualified or could become qualified for and
12 specifically came to the conclusion that he was being very well
13 paid for the work that he was doing and the chances of him
14 finding more prosperous employment without a license to
15 practice law were not good.

16 She specifically testified that the jobs that she
17 found available in the Portland area that he would be qualified
18 for would not pay him more than the job which he had in Klamath
19 County but would actually be detrimental because the cost of
20 living there would be substantially more than Klamath County.

21 She testified the average wage in Klamath Falls is
22 \$26,000 a year, average wage in Oregon \$33,000 a year, and that
23 his job which paid \$39,000 a year were excellent wages for
24 Klamath Falls.

25 Finally the testimony of Glenn Vest and Dan Golden

1 indicated that Mr. Vest had worked for the department, the
2 juvenile department, for 26 years and had been the director for
3 12 and anticipated staying on for a period of time, wasn't
4 specific, wouldn't commit to when he was going to retire.

5 Mr. Hedlund's immediate supervisor was Dan Golden and
6 that was the position that Mr. Hedlund would become eligible
7 for in some period of time, some additional seniority within
8 the juvenile department.

9 There are other juvenile counselors who would also be
10 qualified to apply for that position, but Mr. Golden made it
11 perfectly clear he was going to be there for some extended
12 period of time, was not prepared to retire and no intention of
13 changing jobs. He considered it to be a good job in a local
14 community one of some of -- how did he put that -- socially
15 beneficial position, I think was he characterized the job and
16 how much he liked it.

17 So those were the, in our view, the salient facts
18 that established the three Brunner prongs that Judge Radcliffe
19 relied upon in finding that that -- a portion of that
20 discharge -- well, at the time of the trial Saxman (phonetic)
21 had just been ruled on -- and no, excuse me, it was before
22 Saxman, and Judge Radcliffe had to make a decision whether he
23 had the authority to dispartially discharge the debt, and at
24 that time he foretold Saxman and decided that he could enter
25 into the analysis of whether to discharge a portion of the debt

1 and that's what resulted in the calculations that he made.

2 THE COURT: I don't recall the exact sequence but I
3 was the trial judge in Saxman and the only time I was really
4 pleased to be reversed was when Judge Rothstein reversed me and
5 I suggested that she publish her decision because my
6 recollection of that ruling was I wasn't sure I could do a
7 partial discharge, but if I could, this is what I would do, and
8 in the intervening time you, if BAP or the Circuit did
9 something on a parallel section of 5.3 and then so she thought
10 that meant that she could do that.

11 MR. BOYD: It was the Mervyng opinion (phonetic) --

12 THE COURT: Right. And the dissolution category.

13 MR. BOYD: -- the dissolution category, right. Okay.

14 So what we looked at was the essentially the nuts and
15 bolts analysis of the first prong, and that is, does this
16 family have enough money to make the payment, and the answer
17 was clearly they do not.

18 THE COURT: And that payment at that point was what,
19 800 or something like that?

20 MR. BOYD: \$800 a month. Judge Radcliffe then
21 engaged in I think appropriately the analysis of what expenses
22 might be deleted from their budget to make some room for a
23 payment on a portion of this debt. He also looked at the other
24 side of the coin, what could they do to increase their income,
25 and his feeling was that Mrs. Hedlund could work a couple more

1 days a week.

2 That would be a reasonable conclusion based upon the
3 economics and the finances that they had, impose on family a
4 couple more days a week for babysitting services so that the
5 cost of her -- a babysitting service didn't nullify the
6 additional income that she would be able to make.

7 We submit that that's a reasonable analysis and a
8 reasonable application of the rules from the first Brunner
9 prong.

10 I want to interject because there's been some several
11 cases since then, and I think we can take those into
12 consideration. The BAP clearly applied the inconscionability
13 test to this first prong and that was to determine that if we
14 took out every conceivable not absolutely necessary expense,
15 including the second car, then we can see that he would -- that
16 family would have enough income to pay the \$800 a month
17 payment.

18 That's the test, advise to HEAL in the HSCS loans.
19 The ones that are health education and health service
20 employment loans, and there's a clear congressional policy for
21 the debts incurred in those areas to be harder to discharge
22 then what we'd otherwise refer to as the undue hardship test
23 for a standard student loan debt.

24 And both Judge Alley and Judge Radcliffe have in
25 cases published and unpublished applied the same disposable

1 income test that's essentially applied in Chapter 13 cases, and
2 that's what Judge Radcliffe did here.

3 Based upon the equities that he observed in balancing
4 the interest of the government to have these student loans paid
5 and allow somebody to have a reasonable life, I think he did it
6 exactly right and he got exactly the right answer.

7 It wasn't the answer -- we did not argue for that
8 answer. I believe that the position we originally took was
9 that there was about \$200 a month that would be able -- based
10 upon the fact that he had been garnished for about \$250 a month
11 for several years -- for a little over a year leading up to the
12 bankruptcy, and that we did anticipate his expenses were going
13 to go up a little bit in the future, about \$200 I think was
14 what we argued at the outset. Can't fault his decision at 250,
15 however.

16 The important part there is, and this is what bothers
17 me about the BAP opinion and even the Circuit's opinion, is
18 that -- how it was phrased -- it says the bankruptcy court was
19 not sufficiently --

20 THE COURT: Which one were you looking at?

21 MR. BOYD: I'm looking at the memorandum on the
22 mandate.

23 THE COURT: Oh. The Circuit's opinion?

24 MR. BOYD: The Circuit's opinion. It said under the
25 Brunner, first Brunner factor, the bankruptcy court did not

1 sufficiently consider whether Hedlund could reduce his expenses
2 to meet a greater portion of loan expenses.

3 Instead it found only that Hedlund's expenses could
4 not be reduced enough to support an \$800 per month loan
5 repayment, the amount required for a total pay off. That's
6 actually not what happened.

7 Judge Radcliffe did look at the expenses and there is
8 evidence to support that with a modest reduction in expenses
9 that a portion of that debt could be paid. So I'm not sure
10 where the Ninth Circuit came up with this.

11 It's certainly not supported by the record that I
12 remember we put in and that I've reviewed, and that secondly,
13 it says, it further did not consider whether Hedlund could
14 increase his income either by his taking on a part time or his
15 wife working part time.

16 Again, Judge Radcliffe -- we put on evidence and
17 Judge Radcliffe did consider both of those factors. In fact,
18 in his ruling he mentioned there was ample evidence
19 substantiating that Mr. Hedlund had maximized his income in the
20 Klamath Falls area and what we know from many of the other
21 cases is that -- I haven't found one case that requires
22 somebody to move in order to improve their situation so long as
23 the decision they were making were reasonable, where someone's
24 less than full time employee.

25 There is a case that says, yeah, you got to go out

1 and you got to work, you can work more than 25 hours a week,
2 but where he's working 40 hours a week, it's a full time job.
3 What Judge Radcliffe did and what we think is reasonable was to
4 find that the underemployed spouse should work some more, and
5 that did happen.

6 So those are some problems I have with the BAP
7 opinion and the Circuit's opinion on the remand.

8 Taking into consideration that the second prong of
9 the Brunner test, which is is this situation going to persist
10 for a, lack of a better term, extended period of time. The
11 evidence is uncontroverted in that regard.

12 He has a good job. He's got one step increase which
13 Judge Radcliffe did take into consideration in his opinion and
14 then it was beginning to be cost of living until he was
15 qualified for, applied for and obtained a position of higher
16 responsibility within that department which was the most likely
17 opportunity he was going to have to materially improve his
18 income.

19 Then we have the testimony from the two employees who
20 indicate it's going to be a long time before he's going to be
21 eligible for that position.

22 THE COURT: Or least before that position, either of
23 those positions is available?

24 MR. BOYD: Is available, and then he has to apply for
25 it and presume they contest that position with other qualified

1 candidates.

2 Given his background, it's reasonable to believe that
3 he would be seriously considered for that, for those positions
4 with his legal background and his history and that kind of
5 thing. Certainly was a well respected employee in the juvenile
6 department in Klamath County.

7 So the uncontroverted evidence is that there aren't
8 more lucrative jobs in other locations for which he would be
9 qualified and that the job he has is very good for the area
10 where he lives and that his income is pretty much topped at.

11 That's what that second prong is all about. Nothing
12 more, nothing less. We submit the evidence is clear that we
13 have met the second prong with regard to the Brunner test, and
14 Judge Radcliffe didn't have much of a problem with that one.
15 His focus and most of his focus in the case was on the good
16 faith test.

17 Now, one of the problem -- another problem that I had
18 in reading the BAP opinion and the Circuit's opinion was, and
19 specifically the Circuit's, the bankruptcy court was two
20 charitable in making its finding under the good faith prong.
21 The BAP pointing out among other things that the debtor and his
22 wife have taken no steps to maximize their income nor have they
23 attempted to minimize their expenses such as by eliminating
24 luxury items.

25 Again, we get back to the evidence that they had

1 eliminated some of those expenses during the time that he was
2 being garnished, and we know that because at the time of trial
3 he had added some of those back after we stopped the
4 garnishments, but that was why Judge Radcliffe felt those were
5 expenses that could be eliminated from his budget. He did
6 voluntarily when he had to. We think that's the good faith,
7 that that -- he could have stopped the garnishments at any time
8 and gone back to those expenses if he really wanted to, but he
9 tolerated that in excess of one year.

10 THE COURT: He could have stopped it by the
11 bankruptcy or by some sort of administrative proceeding?

12 MR. BOYD: By the bankruptcy.

13 THE COURT: Okay.

14 MR. BOYD: Yeah.

15 THE COURT: I assume that many, most garnishment
16 situations if you think it's an improper garnishment I don't
17 know that it's an administrative procedure in any detail, but I
18 assume that there's some mechanism available in you're on the
19 receiving end of that and you think you shouldn't be garnished
20 or that the amount's wrong or something like that, that there's
21 some regress available short of filing a bankruptcy?

22 MR. BOYD: I assume that's also true and my
23 recollection is we actually looked into that back in 2003
24 before I filed the bankruptcy because I was unfamiliar with the
25 garnishment procedure that they were using at that time. I'm

1 satisfied that they were -- the actions they were taking were
2 authorized by law, and they were taking what was allowed in
3 Oregon law which is 25 percent of his net take home after
4 taxes, and so they were getting the maximum amount that they
5 could get from him.

6 It was only after TERI garnished his bank account
7 that it became clear that we needed to do something a little
8 bit more drastic to rearrange this situation.

9 So he I think he did address the issue of reducing
10 expenses, and in fact had TERI not garnished, his testimony was
11 he would have allowed that garnishment to continue because he
12 owed them the money. They were entitled to it.

13 Then with regard to the maximizing income issue, his
14 testimony was pretty clear about the jobs that he looked for,
15 the steps he took to obtain employment counseling and the
16 result that he got from that employment counseling was pretty
17 persuasive, he got a pretty good job. Did consider whether two
18 more days of work of his wife was something that they should
19 have done, they didn't act on that. I suppose they could be
20 criticized somewhat for that, but is that really lack of good
21 faith?

22 The totality of the circumstances, as Judge Radcliffe
23 ultimately found, was no, it's not bad faith. The lack of good
24 faith, however, that the BAP and the circuit were looking at
25 were these other two things, not the efforts he made to try to

1 work something out with PHEAA before the trial. So I didn't
2 see any serious criticism of his inability to work out a
3 consolidation or a loan repayment plan prior to the filing of
4 the adversary proceeding. The other two courts seem to focus
5 on the maximizing income and eliminating expenses issues.

6 So what we end up with then is a 33-year-old law
7 graduate who's very close to maximizing his income in a rural
8 county in Oregon with a public job that pays him very well, and
9 yet with that he can't make that full payment to PHEAA which he
10 anticipated he would be able to do if he were practicing as a
11 lawyer.

12 So then we go back to why isn't he practicing as a
13 lawyer. He isn't because he didn't pass the bar exam. Was it
14 reasonable for him to stop after two attempts. Our submissions
15 to the Court is that it was reasonable under the circumstances.

16 He made a valiant effort the first two times. He
17 took the bar review course, he paid the money, he took the
18 time, he tried hard, all the testimony is that he tried hard to
19 pass it. This was what he wanted to do for his career. It was
20 only after he had a family and he had a full-time job that he
21 said, this just isn't going to work for me. Is that an
22 unreasonable thing for him to -- is that an unreasonable
23 decision? I submit to you it is not an unreasonable decision.

24 What did he do? He went out and he got one of the
25 best jobs available to him in Klamath County where he can be

1 with family, they can help him and help he (sic) and his family
2 have a reasonable life.

3 So where his income might have been twice what it is
4 now if he were an attorney, he has to find a way to live within
5 his means, and we think that Judge Radcliffe hit the right
6 standard for the means that are reasonably available to him
7 under the circumstances. Thank you.

8 THE COURT: Thank you.

9 Mr. Monson?

10 MR. MONSON: Thank you, Your Honor.

11 Mr. Boyd has done a tremendous job with the facts
12 that he has in this case, and we don't dispute that. I won't
13 go through all of the facts point by point. The Court has the
14 transcript and the different briefs that have been filed. I'll
15 just highlight a few issues.

16 What's lacking here -- I think it's important to
17 sometimes to step back and look at the full picture -- is there
18 any evidence of an undue hardship, a tight finances, a young
19 graduate who is starting his life out and has some choices to
20 make financially, things are going to be tight.

21 THE COURT: Don't we calculate whether or not it's an
22 undue hardship that that's against making the full payment? Is
23 it not? In other words, the roughly \$800 a month at that
24 point.

25 MR. MONSON: You're right, \$800 a month was the full

1 payment that has to be done, but what I'm speaking of right now
2 is just in a broad brush stroke of what this decision if he's
3 found to be allowed to discharge it, would do and tell other
4 individuals in their same circumstances, but I will get into
5 the more specifics about that \$800 today because I have got
6 some comments on that regarding the payment options that the
7 debtor had.

8 As you know a lot of Courts attempted to pursue undue
9 hardship and find undue hardship in order to get at a partial
10 discharge, and that's a tendency that has to be resisted, and
11 it has to be resisted in this case because the debtor has to
12 meet each and every one of the prongs in order to first find
13 undue hardship and so, you know, we can understand why Judge
14 Radcliffe may have gone to accept the Debtor's argument.

15 At closing the Debtor said, I'm not trying to
16 discharge everything, you know, I agree I can pay a certain
17 amount. Judge Radcliffe agreed.

18 The problem with that is in order to get that result
19 you have to go through the hurdles of the undue hardship
20 analysis and that's where when we think --

21 THE COURT: It's really the way it breaks down though
22 under Brunner and Pena is not just undue hardship. The third
23 prong makes it undue hardship plus good faith of some sort.

24 I mean, it's not hard, you know, on a clean sheet of
25 paper without those cases out there to say -- you can look at

1 the numbers and, you know, the economic circumstances of the
2 family or the individual and figuring out whether or not
3 something might be an undue hardship whatever you define as
4 undue.

5 And good faith really doesn't -- as long as it's
6 about numbers -- doesn't enter into it. Good faith comes from
7 the way that the courts approached a pretty open -- in a sense
8 not very -- congress didn't articulate very tight standards or,
9 you know, they gave us a very broad term and we're supposed to
10 be figuring it out.

11 MR. MONSON: Yeah, no definition.

12 THE COURT: But I guess -- I know I'm wandering
13 little bit here, but it seems to me that given what his income
14 was at the time it's hard to see how an \$800 a month payment
15 wouldn't be an undue hardship whether he was in good faith or
16 bad faith. That's kind of a long way around to that.

17 MR. MONSON: Right. Let me address the \$800 a month.
18 Prior to trial the party stipulated to payment options that are
19 stipulated facts, both sides had it, the debtor has now come
20 back and said, we, wait a minute that was right before on the
21 trial -- right on the eve of trial to try to make a difference
22 between, you know, right before trial versus a month, versus
23 two months or six months.

24 Regardless of the timing, the parties agreed that the
25 debtor as an alternative to the income contingent program had

1 these payment options and so when you look at the ability of
2 the debtor to repay under these payment options, it's clear
3 that under, you know, \$49 up to \$118 would satisfy all that was
4 being required.

5 THE COURT: More than what he was then paying?

6 MR. MONSON: Right. More than what he was paying.

7 THE COURT: But those -- I don't remember if all
8 three of them, but at least two of them I think had a step up
9 somewhere into the program.

10 MR. MONSON: They were all stepped up and that's why
11 I'm using the 49 and 118 is depending if you go with a full
12 step up it gets up to the 118. The first option would be \$49
13 more and then the very most he would have to pay more is \$118.

14 So when you look at it -- so that's -- I think that's
15 significant because that is what the parties agreed would be a
16 repayment option as an alternative to the income contingent
17 program.

18 And when you look at the Debtor's garnishment
19 situation, he said that he could afford \$258 that was being
20 garnished. That was something that he lived with, he could
21 live with, that wasn't a problem for him. It was just that
22 TERI --

23 THE COURT: But that's without dealing with the other
24 student loan creditor.

25 MR. MONSON: Correct. That other student loan

1 creditor taking that full garnishment amount caused the, you
2 know, caused the need for bankruptcy and that type of thing.
3 So when you look at Hedlund being young, being healthy, no
4 disabilities, no addictions, the expert that came in and
5 testified as to his qualifications gave raving reviews, as did
6 his supervisors, about his performance, his skills, his
7 abilities. There's nothing in the record to seem to indicate
8 that this individual is going to have a hard time going
9 forward.

10 All the evidence shows bright future, strong,
11 capable, and so --

12 THE COURT: But did --

13 MR. MONSON: Excuse me, go ahead.

14 THE COURT: -- it shows that in one sense, but it
15 doesn't show that there's much available in the way of more
16 enumerative place of employment for him. He's either got to
17 move and deal with perhaps at least the marginal cost of
18 living -- increase cost of living someplace else which they
19 seem to -- he and Ms. Pentz seem to have concluded at least
20 everything that they had looked at, which wasn't minimal,
21 wasn't a net improvement, or what he could look for in Klamath
22 Falls which -- and as Mr. Boyd says she at least thought it was
23 a pretty good job and he thought it was too.

24 MR. MONSON: Right. He was making \$40,000 a year.
25 Did I cut you off or did you have anything else?

1 THE COURT: No. No.

2 MR. MONSON: Yeah, we agreed, you know, he was making
3 \$40,000 a year --

4 THE COURT: But what I'm -- let me tell you why I ask
5 that. You're saying he's got a bright future and so on, but
6 does the future look much better economically is the question.

7 MR. MONSON: Well, that kind of gets down to the
8 Court dictating his circumstances versus the Debtor being able
9 to choose where he wanted to go. He could have taken the bar
10 exam again, and nothing stopped him from taking another bar
11 exam that -- and still doesn't, he still has the ability to
12 take the bar exam.

13 The fact that he, you know, put up his hands and
14 said, you know, no more, out of frustration and bitterness,
15 understandable. However, that avenue is completely open to him
16 and to find that that is somehow a hardship, and undue
17 hardship, I think really strains the law in this area.

18 When you look at maximizing the Debtor's expenses and
19 minimizing his -- excuse me, maximizing his income and
20 minimizing his expenses, there's room there for the Debtor to
21 work more, he's working 9:00 to 5:00, Monday through Friday.
22 No reason why he couldn't take on more part time work.

23 THE COURT: Any idea what -- reading the transcript
24 and I don't recall that he was asked, you know, what other
25 part-time work might be available to him.

1 MR. MONSON: I don't believe there was because in his
2 mind that wasn't an option. That wasn't something he was
3 considering or thinking about or putting forth as an
4 alternative.

5 THE COURT: But is there any evidence then to suggest
6 there's any realistic extra work that he could have?

7 MR. MONSON: I don't think there's any evidence of
8 direct testimony other than what he's done in the past in the
9 area. I mean, he definitely has paralegal skills that he's
10 used.

11 THE COURT: This is a -- Klamath Falls is a pretty
12 small city as I recall.

13 MR. MONSON: It is.

14 THE COURT: Are there likely to be many law practices
15 there that don't deal with the County, and could he work for
16 any of those?

17 MR. MONSON: Yeah, I think that is unknown from our
18 perspective.

19 THE COURT: I mean, other than working for his
20 father's order of protection perhaps his brother's law firm if
21 they're not the same. I mean, one would think any other law
22 firm in town would be somewhat leery of hiring a son of a
23 practicing lawyer in town.

24 MR. MONSON: Yeah.

25 THE COURT: So I wonder how -- I mean, there's

1 nothing to -- I didn't see any evidence and I'm just kind of
2 puzzled about what realistically might be available to him in
3 that way. If the County's not paying him overtime so he
4 doesn't have that option whether or not he could get the
5 overtime if they were in the business of paying overtime.

6 MR. MONSON: I think the hard part in that area, Your
7 Honor, is that there is lacking in the evidence the number of
8 law firms, the number of paralegal jobs, the number -- the
9 other part time work whether --

10 THE COURT: Is that an affirmative obligation of the
11 Debtor to prove that up? I mean, he's told you -- he's got to
12 show undue hardship and persistence and good faith, but --

13 MR. MONSON: Right.

14 THE COURT: Does he have to disprove negatives.

15 MR. MONSON: Let me answer it this way by looking at
16 the unconscionability (sic) standard that Mr. Boyd brought up.
17 He brought it up in the context of HEAL loans, and definitely
18 that there is an unconscionability standard instead of an undue
19 hardship standard. So that can be set aside and really treat
20 it as not relevant.

21 For this Court, the unconscionability comes in under
22 the Nasamano (phonetic) and the Berrain (phonetic) cases that
23 indicate that defining undue hardship courts require more than
24 temporary financial adversity, but typically stop short of
25 other hopelessness, the proper inquiries whether it be

1 unconscionable, quote, unquote, to require the Debtor to take
2 steps to earn more income or reduce her expenses. That's
3 quoting the Berrain case, quoting Nasamano.

4 THE COURT: Is that the same question as -- I mean,
5 he's taken some steps in the sense of talking to the counselors
6 and looking into other prospects.

7 MR. MONSON: Your Honor, let me answer that inquiry
8 because that's a good one.

9 The talking to counselors, that was anticipation of
10 litigation. That was, bring a counselor in.

11 THE COURT: Yeah.

12 MR. MONSON: -- for the undue hardship. That wasn't -
13 - when you look at his deposition transcript, there isn't, you
14 know, I sent out resumes and I checked on a few things, but
15 there isn't an in-depth search of other types of employment at
16 that stage.

17 So when you go through the analysis and look at all
18 of the evidence and you break down the first prong, and the
19 second prong, and the third prong, dealing with the good faith,
20 we are just lacking in finding that undue hardship exists in
21 order to get to, then let's look at the partial discharge
22 situation.

23 Does the Court have any other questions?

24 THE COURT: One of them is really the practical
25 implications of that approach. If I were to rule on that basis

1 and in favor of PHEAA, I take it the debt goes back to whatever
2 it was with credit for whatever payments he's made in the
3 meantime, plus accrued interest which may even have exceeded
4 the payments on the whole interest -- if you accrued interest
5 at 4. something on 80-some thousand dollars, and I don't know
6 his current situation and we we're treating this as if we're
7 still at the -- essentially at the close of trial in 2003.

8 But if Judge Radcliffe's conclusion about what his
9 likely prospects were at that time is somewhat congruent with
10 the reality and he really is in a similar kind of situation
11 now. He's not going to be able to pay whatever that balance
12 is, and it's -- you know, I don't know whether the current
13 iteration of the ICRP would have any -- give any basis for my
14 hope or whether we would just be looking at a brand new Chapter
15 7 and getting to do this again, you know, a decade later.

16 Is that a sensible outcome for anybody?

17 MR. MONSON: Well --

18 THE COURT: And that's really -- I mean, it's a
19 practical and not a legal question.

20 MR. MONSON: That is correct. You know, that's what
21 we're here for. We've been through enough of the legal
22 arguments, we're here, you know, to talk practicalities.

23 The Ninth Circuit after the oral argument asked the
24 parties if this could be mitigated and we --

25 THE COURT: Mediated?

1 MR. MONSON: I'm sorry, mediated. We shot up our
2 hands and said, absolutely, let's sit down and try to mediate
3 this. We'd like to be able to get this resolved. We went
4 through that process with the Ninth Circuit mediator and the
5 problem that came up was the Debtors had a hang up about
6 whether or not there would be tax consequences at the end of
7 the prepayment.

8 THE COURT: And that's on the --

9 MR. BOYD: Judge, just for the record, I don't think
10 it's appropriate to be putting mediation facts into evidence at
11 this point.

12 THE COURT: Right.

13 MR. BOYD: I'd ask the Court not to take those into
14 consideration.

15 THE COURT: Okay.

16 MR. BOYD: I understand the argument, but I think
17 it's a technical rule.

18 MR. MONSON: Well, to the extent that our argument --

19 THE COURT: We know -- so what you're telling me is
20 there has been mediation and it hasn't resolved it?

21 MR. MONSON: As a result, would the Court like to
22 hear more about that process?

23 THE COURT: Not especially. It's just -- I mean, it
24 certainly occurred to me reading through all this, one of this
25 things I thought about suggested at the conclusion of the

1 hearing if I didn't realize the Circuit had already that you'd
2 already explored that was -- wouldn't this be an appropriate
3 thing to do, but maybe not so.

4 MR. MONSON: Well, we have tried that and if the
5 Court would like more details about that, I'd be happy to share
6 those.

7 THE COURT: No, I think as far as if we're not going
8 to decide on the two of you and your clients can't settle I'm
9 going to decide on the record, and as the Circuit has required
10 I don't want to get into that at all.

11 MR. MONSON: Sure. Is there any other questions that
12 the Court has?

13 THE COURT: This is another one I've had trouble
14 trying to figure out how to phrase. The third prong analysis,
15 the good faith analysis, and I'm still trying to figure out
16 whether or not on a logical level that might be somewhat
17 circular when you're looking at a partial discharge. At least
18 when the considerations in deciding good faith or not are
19 economic, how much has he paid, how much has he minimized
20 expenses because it seems to me if you're doing a partial
21 discharge situation you're looking prospectively at what will
22 happen after now.

23 And the fact that in the past the Debtors did or
24 didn't do something that might have made a difference in how
25 much they could pay doesn't add anything to that analysis.

1 So I'm struggling with applying the good faith. I
2 know the cases all say you need to find that there's been good
3 faith before you can consider partial discharge, but then I'm
4 trying to figure out why that -- I was trying to figure how
5 that all fits together in a logical sense and whether it
6 informs the analysis very much other than sort of the real --
7 other than looking at good faith and more in the noneconomic
8 terms that we think of it in a lot of other situations.

9 MR. MONSON: It's a good question, Your Honor,
10 because it's almost as if the term good faith is not the
11 appropriate term for the third prong because when you look at
12 the four or five elements that the Court say --

13 THE COURT: It's just more like a best efforts kind
14 of thing.

15 MR. MONSON: It does because if you're looping back
16 into minimizing expenses, maximizing income, part of prong one
17 and there's, you know, a good faith effort to repay is really
18 made, the only part of good faith that it still exists. So
19 that's the circular argument that we see and the problem we see
20 with that terminology.

21 THE COURT: Let me request, and I guess before you
22 answer I'd like to make sure this doesn't -- this may be an
23 objectionable question.

24 Should I -- I guess I'm curious about whether the
25 Debtor has been making the payments in accord with Judge

1 Radcliffe's ruling and if -- does that present any problems
2 asking that question from your point, Mr. Boyd?

3 MR. BOYD: I don't think it does, Your Honor, but I
4 don't know the answer.

5 MR. MONSON: Yeah, I do.

6 MR. BOYD: You do.

7 MR. MONSON: The Debtor's made one payment of 900
8 and --

9 THE COURT: No, I mean, since Judge Radcliffe's --

10 MR. MONSON: Right.

11 THE COURT: -- decision.

12 MR. MONSON: Well, yeah, no, no payments. The entire
13 payment history I can give the Court. The one payment of 900
14 plus and then payments applied on the administrative
15 garnishments and that's all. Nothing since the bankruptcy
16 filing.

17 THE COURT: I'm not quite sure I know -- maybe I
18 shouldn't have asked that question. I don't know quite what to
19 do with that at this point because it suggests and -- I mean,
20 one of the possibilities that that suggests is that whatever
21 decision I make whether or not it gets appealed again really
22 isn't going to change the facts on the ground at all, and I
23 just wonder if we're helping anybody by going through all this.

24 I don't have any answers. I mean, I understand the
25 parties' positions and why you have -- why you're making the

1 arguments and why you're still here, but I'm trying to figure
2 what on earth will happen here after whatever I do with it.

3 MR. MONSON: You're right. Your Honor, I think
4 that's a good analysis to be concerned about because we have
5 that same concern, I mean, with Mr. Hedlund, but also this
6 Court's decision affects the way non dischargeability under
7 undue hardship under 523(a) gets interpreted and used in this
8 area and so it has consequences.

9 And if you have a young man who's strong, healthy and
10 no disabilities, no addictions, ability to work more, a
11 companion that has ability to work more, and you grant them an
12 undue hardship, what are you saying to the rest of the
13 Mr. Hedlund's of the world and Mrs. Hedlund's that come down
14 the pike?

15 That's a concern I think that has to be addressed or
16 at least thought about in the context of where we go from here.

17 THE COURT: Just looking to see if I had any other
18 questions that I -- I don't think so.

19 MR. MONSON: Your Honor, well thank you for your
20 consideration, thank you for taking this case on.

21 THE COURT: Okay.

22 MR. MONSON: We realize the difficult circumstances
23 that came about because of it and --

24 THE COURT: Well, it --

25 MR. MONSON: -- we appreciate --

1 THE COURT: -- yeah, it's really a sad occasion that
2 it had to be done. I knew Judge Radcliffe moderately well, you
3 know, someone in the neighboring state and saw him in various
4 events and conferences and so on and had high regard for him.
5 He certainly is missed so.

6 Mr. Boyd, anything further?

7 MR. BOYD: Just briefly, Your Honor. The notion that
8 this case will advise others in its outcome to me is in
9 congress with what the Court is supposed to do.

10 This, for lack of a better term, requires the Court
11 to use the totality of the circumstances to look at each one of
12 the three prongs and draw a conclusion based on the facts that
13 are here.

14 THE COURT: You don't agree with Napoleon that we
15 ought to shoot a deserter to encourage the others?

16 MR. BOYD: No. But if in fact there's any
17 consideration for that, I would take the opposite view of
18 Mr. Monson and that is to say that an opinion that shows a
19 healthy young man who through circumstances that we contend are
20 not of his own making cannot take full advantage of the
21 education that he obtained and that for which he obtained loans
22 to obtain, can still have a reasonable life even though he's
23 not making the money he anticipated.

24 I consider that to be a message of hope, and contrary
25 to Mr. Monson's view that it's more important that he pay the

1 loan then that he be in some form indentured, I would say I
2 think it's more important that people have hope and that they
3 work hard and that they try to maximize the amount they can pay
4 their creditors, and I think Mr. Hedlund has done that here
5 with Judge Radcliffe's help.

6 The last thing I want to talk about is I looked at
7 the facts in 11 of the cases that are cited in the various
8 memorandum. Of those discharges or partial discharges were
9 granted in seven and no discharge at all was allowed in four.
10 I submit to the Court that if you try to focus on the various
11 different facts that were important to the Court's in these
12 opinions and try to rationalize all of those opinions, there is
13 no way you can do that.

14 Each case stands on its own merits, and what might
15 have been important in one case is not at all important in
16 another.

17 The Pena case, for example, in that going by
18 Mr. Hedlund's -- or by Mr. Monson's analysis, Mr. Pena was
19 healthy, nothing prevented him from having a rosy future. He
20 had a degree, but he was working at a blue collar job, and what
21 the Court determined in that case based on those circumstances
22 was that his education was worthless to him. That's the exact
23 language the Court used in describing his circumstances.

24 And although Mr. Hedlund's education isn't useless to
25 him, it certainly isn't as useful as if he were a lawyer. Now,

1 did he take reasonable steps to become a lawyer? We say that
2 he did. Thank you.

3 THE COURT: Thank you, both. I'm not sure exactly
4 how long it's going to take to sort through all this and reach
5 a decision, and I'm not sure whether at that point I'm going to
6 want do it with a written decision or set up a further hearing
7 and do an oral decision, but we'll be in touch or we'll send
8 you some mail, one or the other.

9 MR. BOYD: Okay. Thank you, Your Honor.

10 MR. MONSON: Thank you.

11 THE COURT: We'll be at recess.

12 (Proceedings Concluded)

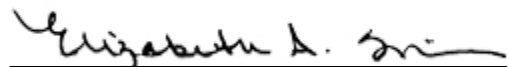
13

14

15 I certify that the foregoing is a correct transcript
16 from the record of proceedings in the above-entitled matter.

17

18 Dated: August 30, 2011



AVTranz, Inc.
845 North Third Avenue
Phoenix, AZ 85003

19

20

21

22

23

24

25