

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JIMMY D. & JOANN HART,	)	CASE NO. BK92-81099
	)	
DEBTOR	)	A92-8135
	)	
JIMMY D. HART,	)	
	)	CH. 7
Plaintiff	)	
vs.	)	
	)	
UNIPAC, NEBRASKA STUDENT LOAN	)	
PROGRAM, INC., (NSLP), Substituted	)	
Defendant for and Assignee of	)	
Union Bank & Trust; MIDLAND	)	
COLLEGE AND WACHOVIA, SFS, INC.,	)	
	)	
Defendant	)	

MEMORANDUM

Hearing was held on June 22, 1993, on the above adversary proceeding. Appearing on behalf of debtor was Richard Register of Fremont, Nebraska. Appearing on behalf of NSLP was Paul J. Peter of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., Lincoln, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction over the matter under 11 U.S.C. § 523(a)(8)(B) and 28 U.S.C. § 1334.

Background

Between 1982 and 1990, plaintiff Jimmy D. Hart obtained student loans which are now owned by Nebraska Student Loan Program, Inc., (NSLP). The principal amount due is \$8,942.00. Plaintiffs Jimmy D. Hart and Joann Hart filed a Chapter 7 bankruptcy petition on June 22, 1992, and shortly thereafter filed this adversary proceeding requesting a determination that the student loans be discharged pursuant to 11 U.S.C. § 523(a)(8)(A) and (B). Prior to trial, the request for discharge under Section 523(a)(8)(A) was withdrawn. Defendants Midland College and Wachovia, SFS, Inc., have not appeared.

Since the defendants have been properly served, Midland College and Wachovia, SFS, Inc., are found to be in default and judgment of dischargeability is entered in favor of the plaintiffs and against Midland College and Wachovia, SFS, Inc.

The parties have agreed that Unipac Service Corporation has no interest in this case and should be and is hereby dismissed.

The parties have further agreed that NSLP is the assignee of the loan obligations and loan rights from Union Bank and Trust and is the true party in interest, rather than Union Bank and Trust. By prior order, NSLP has been substituted as a defendant in place of Union Bank.

The matter proceeded to trial on the issue of dischargeability under 11 U.S.C. § 523(a)(8)(B), the "undue hardship" discharge.

#### Decision

This Court finds that the student loan obligation of Jimmy D. Hart should be discharged because excepting such debt from discharge will impose an undue hardship on the debtor and the debtor's dependents.

#### Findings of Fact, Conclusions of Law, Discussion

The debtor Jimmy D. Hart lives in Fremont, Nebraska, with his wife and two children. He also has children from a previous marriage to whom he is attempting to pay current support and owes back support in the amount of \$8,000.00 to \$9,000.00 for one or more emancipated children.

Currently, Mr. Hart has a part-time job selling inventory at a hardware store in Fremont, Nebraska. His gross income is approximately \$100.00 per week. His job history includes working at the United States Postal Service from 1973 to 1982. He was injured in 1980 and was unable to continue performing the job. He was off work following the injury for one and one-half months, then was permitted to deliver mail with a cart but could not do the job. He filed for Worker's Compensation in 1981 but did not receive any benefits until 1986. Those benefits continued through part of 1992 when he was notified that a claims examiner had determined that he was no longer qualified for Worker's Compensation. His medical specialist said he was still qualified, but he was unable to satisfy the Government examiners and was terminated from receiving further benefits.

During the period following his termination by the Post Office and before he began receiving Worker's Compensation benefits, Mr. Hart was unemployed for two years. Thereafter, Mr. Hart held several odd jobs: he delivered newspapers temporarily; he attempted to sell automobiles, which occasionally earned enough money for rent and groceries; he obtained an insurance salesman's license and was able to find work on commission for one year during 1984 and for part of 1985; and at various times, he picked tomatoes to buy food for his family.

In 1988, while Mr. Hart was receiving Worker's Compensation benefits, Mr. Hart obtained employment at an Applause video store in Fremont. He worked part time from September of 1988 until February of 1992 and went to school. Then, he took a full-time job at the Holiday Lodge in Fremont as a night auditor for \$4.50 per hour. He was unable to continue working as a night auditor because of his health situation.

The type of work that Mr. Hart has been able to find is the type that he cannot tolerate. He testified that in the last year he has applied to more than 100 places for work. In his job search, he uses the newspapers and the job service, and he goes door to door. He has filed numerous applications and resumes, but he has not received employment. He was unemployed from January to May of 1993 after having found only part-time work prior to that. At the time of the trial on June 22, 1993, he was employed part time by the hardware store referred to above.

Mr. Hart graduated from high school in 1964. He took auto mechanics training in 1965 and began his college training in 1982 at Midlands College. During the early 80's, he divorced, remarried, attended vocational education training, attended Metropolitan Community College from September of 1988 to May of 1991, and received an associate degree in business administration. He has been unable to find work related to his degree.

After his back injury at the Postal Service in 1980, Mr. Hart has had various treating physicians in Fremont and in Omaha. He has had physical therapy and numerous tests, and when he has had the money, he obtains certain physician administered injections which give him temporary relief from chronic back pain. No treatment that he has received helps him, except temporarily. He has not recently had physical therapy because he cannot afford it, and he has no health insurance.

As a result of his back pain, he cannot get up and down or in and out of chairs without difficulty and pain. His back pain affects his sleep. His doctors have given him a twenty-five

pound lifting limit, and he is unable to sit more than one to one and one-half hours. He cannot stand more than fifteen minutes. Kneeling and bending is a problem. During the trial, he testified that he was in discomfort sitting in the witness chair. His physical appearance was consistent with the testimony.

In addition to the back problem, Mr. Hart has anxiety and depression. He has received treatment from a psychologist and psychiatrist, but without health insurance and a job that pays more than minimum wage, he cannot afford to pay for medication or further therapy.

Prior to his work-related injury, Mr. Hart had problems with alcoholism. He admits that he is a recovering alcoholic and uses the help of support groups to deal with the alcoholism. Since treatment, he no longer drinks any alcoholic beverages.

In 1981 Mr. Hart was diagnosed with a blood sugar problem. He has dizzy spells and a rapid pulse on occasion. At least one doctor has diagnosed his situation as hypoglycemia. He is not on medication for the condition, but is supposed to watch his diet. Approximately one year ago, he was hospitalized for low blood sugar and problems caused by the condition. His blood sugar problems present symptoms like diabetes. He gets shaky and needs to eat or drink orange juice immediately. Sometimes the condition affects his driving.

Mr. Hart has filed for Social Security disability but has not received any decision. Because Mr. Hart's wife works, her income disqualifies the family for Medicaid. Therefore, the family has been required to use a local food pantry; they have received help from a low-income ministry in the community operated by the Catholic church; Mr. Hart's parents have helped pay the rent; the family has received aid in recent months from the Salvation Army; and the family has recently begun to receive food stamps.

Mrs. Hart testified that the parties had been married nine years and that she was not a co-signer on any of the student loans. She described Mr. Hart's physical condition. When he comes home from work he is exhausted, in pain and needs sleep immediately. He has had the same physical limitations at each job that he has held over the last several years. Because the jobs require him to sit or stand for various lengths of time and because he is unable to do the job, he is under severe stress. She testified that from her observation he is unable to work more than four or five hours a day.

When he is able to pay for treatment and therapy, he has a more positive attitude and much less pain. She says that he can't support himself and that they, as a family unit, are "not making it." They are required to borrow from their parents, borrow from their friends, use food stamps, get help with their utilities, and they have now exhausted their resources. They have two cars, a 1983 vehicle that has more than 130,000 miles on it and one built in the 1970's that has more than 130,000 miles on it. Neither Mr. Hart nor Mrs. Hart is very hopeful that he will be able to obtain regular employment in the future. The pain that he suffers regularly affects his family life as well as his outside activities.

Although the current net family income, assuming he will be able to continue or earn a gross income of approximately \$100.00 a week, is approximately \$15,000.00, it includes Mrs. Hart's wages and the child support that Mr. Hart pays. One child will leave home in one year, and the child support that child receives will be cut from \$250.00 per month to \$125.00 per month.

The Eighth Circuit Court of Appeals has held that there is no mechanical formula which the courts may invoke in determining whether the requirement of repayment of a student loan would put an undue hardship on the debtor. The trial court is required to examine all of the facts and circumstances surrounding the particular bankruptcy and determine whether there would be anything left from the debtor's estimated future income to enable the debtor to make some payments on the student loan. Andrews v. South Dakota Assistance Corp., 661 F.2d 702, 704 (8th Cir. 1981).

Recently, the Seventh Circuit Court of Appeals in Matter of Roberson, 1993 W.L. 269807 (7th Cir. (Ill.) July 20, 1993) attempted to ascertain the meaning of "undue hardship" under Section 523(a)(8)(B). That Circuit Court adopted the undue hardship test set forth by the Second Circuit in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987) (per curiam). Under that decision, "undue hardship" requires a three-part showing (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 loan; (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 loan; and (3) that the debtor has made good faith efforts to repay the loans.

It is apparent from the evidence presented at trial that the debtor, as a result of his physical disabilities, is unable to obtain employment which, considering his and his family expenses,

will permit a minimal standard of living for the family if he is forced to repay the loans. Currently and for a significant time prior to trial, this debtor has been under employed; therefore, the family unit has had to rely upon the charity of others to pay rent and obtain sufficient food and clothing.

Based upon the length of time that the debtor has had the disabling problems, the length of time that he has been unable to obtain and keep full-time employment, the testimony of the debtor and his spouse with regard to his continuing need for physical therapy and medication, and the lack of health insurance or funds to purchase such services, this Court finds his inability to repay the student loan will continue over an extended period of time. Under his current circumstances, he is unable to provide basic needs for his family or pay child support obligations that have accrued, and there is no evidence that his circumstances will change in the short run or the long run.

Although no significant payments have been made on the student loan, the evidence presented concerning Mr. Hart's willingness to obtain employment, his inability to keep employment, his willingness to maximize his income, and his willingness to minimize his expenses convinces this Court that if he had the ability to pay he would attempt to repay the student loan.

This Court has examined the history of this debtor and the present financial and family circumstances of this debtor. By evaluating the evidence, the Court has concluded that requiring this debtor to repay these student loans will truly place an undue hardship upon Mr. Hart and his dependents. The family is "not making it" now and to leave Mr. Hart with an obligation to pay more than \$8,000.00 in student loans plus accruing interest will assure that he will "not make it" in the future.

The student loan obligation of the debtor Jimmy D. Hart is dischargeable.

Separate journal entry shall be entered.

DATED: August 24, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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FOR THE DISTRICT OF NEBRASKA

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JIMMY D. & JOANN HART,	)	CASE NO. BK92-81099
	)	A92-8135
<u>DEBTOR(S)</u>	)	
	)	CH. 7
JIMMY D. HART,	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: August 24, 1993
<u>Defendant(s)</u>	)	HEARING DATE: June 22,
	)	1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding adversary complaint.

APPEARANCES

Richard Register, Attorney for debtor  
Paul Peter, Attorney for NSLP

IT IS ORDERED:

The student loan obligation of the debtor Jimmy D. Hart is dischargeable. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge