

APR 16 2013

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

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ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-11-1233-RnPaKi
	)	
JANET ROSE ROTH,	)	Bk. No. 09-00317-RJH
	)	
Debtor.	)	Adv. No. 10-0764-RJH
_____	)	
JANET ROSE ROTH,	)	
	)	
Appellant,	)	
v.	)	<b>O P I N I O N</b>
	)	
EDUCATIONAL CREDIT MANAGEMENT	)	
CORPORATION,	)	
	)	
Appellee.	)	
_____	)	

Submitted Without Oral Argument on September 20, 2012<sup>1</sup>

Filed - April 16, 2013

Appeal from the United States Bankruptcy Court  
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Appellant Jane Rose Roth on brief;  
Julie K. Swedback, Esq. on brief for appellee  
Educational Credit Management Corporation.

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<sup>1</sup> Pursuant to Fed. R. Bankr. P. 8012, after notice to the parties, the Panel by order entered July 3, 2012, unanimously determined after examination of the briefs and record that oral argument was not needed.

1 Before: RENN,<sup>2</sup> PAPPAS and KIRSCHER, Bankruptcy Judges.

2 Opinion by Judge Renn  
3 Concurrence by Judge Pappas

4 RENN, Bankruptcy Judge:

5 This pro se appeal arises from a judgment rendered after  
6 trial in an adversary proceeding which excepted from discharge under  
7 11 U.S.C. § 523(a)(8)<sup>3</sup> Debtor Janet Roth's ("Debtor") student loan  
8 debt to Educational Credit Management Corporation ("ECMC"). We  
9 REVERSE and REMAND.

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22 <sup>2</sup> Hon. Thomas M. Renn, U. S. Bankruptcy Judge for the District  
23 of Oregon, sitting by designation.

24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to  
26 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

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**I. FACTS<sup>4</sup>**

From 1989 to 1995 Debtor took out thirteen federally guaranteed student loans totaling over \$33,000 under the Federal Family Educational Loan Program ("FFELP Loans") to fund her attendance at Mesa Community College and Arizona State University. In addition to the FFELP Loans, Debtor also took out five direct loans administered by the U.S. Department of Education ("DOE"). During her attendance at school, Debtor studied communications, information technology, and education, but she never graduated as a family issue necessitated her quitting the programs.

Debtor's employment history is long and varied. She has worked for extended periods as an information management clerk for the U.S. Defense Department, a ticketing counter clerk for several

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<sup>4</sup> Debtor asks us to review "all appellant's exhibits submitted throughout [the adversary proceeding below]." Aplt.'s Opening Br. at 6. However, her excerpt of record does not include all of those exhibits. Nevertheless, we have exercised our discretion to take judicial notice of the electronic record in the adversary, as "we make reasonable allowance for pro se litigants and construe their papers liberally." Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th Cir. BAP 2006); see also O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989)(court may take judicial notice of bankruptcy case below). We have not, however, considered documents that neither we nor the parties have identified as part of the trial court record. Kirshner v. Uniden Corp. of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988). For example, Debtor has adduced two pages of account statements, Aplt. ER at 17-18, with line-items she argues indicate "voluntee [sic] payments," on the FFELP Loans, which she found [post trial] "digging through old student loan files." Aplt. Opening Br. at 4. Those account statements have not been considered.

1 airlines, an information technology technician for a collection of  
2 used car dealerships, an administrative assistant for Arizona State  
3 University, and a government contract analyst for the Veterans  
4 Administration. Her last job was as a cake decorator for Wal-Mart.  
5 She has often worked more than one job at the same time to make ends  
6 meet. In 2008, her adjusted gross income was \$34,789. In 2009, it  
7 was \$40,098.

8 Debtor made no voluntary payments on the FFELP Loans. She  
9 defaulted on three of them in 1998, and on the rest in 2001. Pre-  
10 default she was eligible for forbearances. At one point, she  
11 testified she sent paperwork to Chicago regarding a forbearance,  
12 but she never heard back and never followed up. Other than that  
13 attempt, she did not seek any deferments or forbearances. Neither  
14 did she make any efforts to restructure the loans to reduce the  
15 payments or otherwise modify their terms. She testified that before  
16 she filed bankruptcy, she did not know whom to call to obtain a  
17 modification.

18 For a time the DOE administratively garnished her wages.  
19 Debtor testified she was unaware she had two lenders and presumed  
20 the collection activity pertained to the FFELP Loans. It appears at  
21 some point one or more of ECMC's predecessors-in-interest attempted  
22 to also garnish Debtor's wages but, because the DOE had a continuing  
23 garnishment in place or she was unemployed, those attempts were  
24 unsuccessful. It also appears that at certain times Debtor's  
25 federal and state tax refunds were offset against her student loan  
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1 obligations. The record, however, is unclear as to whether those  
2 offsets were initiated by the DOE (or its agents) or by ECMC's  
3 predecessors. It is clear from the record that Debtor was unable to  
4 identify which loans received payments or even that two lenders were  
5 involved in administering the various loans.

6 At present, Debtor suffers from several chronic medical  
7 conditions including a thyroid condition, diabetes, macular  
8 degeneration, cataracts, high cholesterol, and depression. Some of  
9 her medical conditions required surgery. Debtor has also incurred  
10 serious shoulder, knee, and wrist injuries that have limited her  
11 activities. All of her medical ills necessitate many medical  
12 appointments, which in some instances have precluded eligibility for  
13 new employment. Although hampered by her ailments, Debtor feels she  
14 is not totally disabled from working unless her "sight goes and . .  
15 . [she] can't read." [Trial Tr. (April 27, 2011) 42:22].

16 On January 8, 2009, Debtor filed for Chapter 7 relief pro se.  
17 On April 27, 2010, she commenced an adversary proceeding in the  
18 bankruptcy court seeking to have both the FFELP and DOE Loans  
19 discharged. Shortly thereafter, the FFELP Loans were assigned to  
20 ECMC. As of January 5, 2011, the aggregate balance on the FFELP  
21 Loans was at least \$95,403.86. Based on an administrative discharge  
22 of the DOE loans, the DOE was dismissed from the adversary  
23 proceeding pursuant to an order entered June 1, 2010.

24 From July 2009 to January 2011, Debtor applied unsuccessfully  
25 for over 280 federal jobs. She concentrated on this employment  
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1 sector, because she had previously been a federal employee and  
2 believed she had preferential rehiring rights. She also applied for  
3 non-federal positions. She testified that she's worked for forty-  
4 five years and wanted to find a job, although it would only be  
5 justified to do so if it paid above minimum wage. She further  
6 testified that if her discharge was denied, she might either enroll  
7 in the income-based repayment plan discussed below, or remain  
8 unemployed.

9           Approximately six months after the adversary proceeding was  
10 filed, ECMC sent Debtor information and an application to  
11 administratively discharge her FFELP debt based on total and  
12 permanent disability. Debtor did not apply because she did not  
13 consider herself sufficiently disabled. Approximately three months  
14 later, ECMC advised Debtor she was eligible under the federal  
15 William D. Ford program to consolidate all thirteen of her FFELP  
16 loans and participate in the "income-based repayment plan" ("IBRP").  
17 The IBRP requires the borrower to make a twenty-five-year commitment  
18 to dedicate on a monthly basis 1/12th of fifteen percent of the  
19 amount her average gross income exceeds 150% of the federal poverty  
20 level for the debtor's family size.<sup>5</sup> 34 C.F.R. § 685.221. The plan

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22           <sup>5</sup> The IBRP should be distinguished from the "Income Contingent  
23 Repayment Program" ("ICRP"), 34 C.F.R. § 685.209(a), another  
24 repayment plan offered under the Ford program and referenced in many  
25 student loan cases. E.g., Braun v. Sallie Mae (In re Braun),  
26 2012 WL 5199163 at \*8 (Bankr. E.D. Va. October 19, 2012)(comparing  
the IBRP and ICRP).

1 term would be twenty-five years; thereafter, any remaining balance  
2 would be forgiven. 34 C.F.R. § 685.221(f).<sup>6</sup> Because Debtor's  
3 income did not exceed the federal poverty level, her initial monthly  
4 IBRP payment would have been zero, and would have remained so until  
5 the 150% income threshold was met. Debtor understood the terms and  
6 conditions of the IBRP but did not apply for it, reasoning she could  
7 do so at any time, even if the bankruptcy court denied discharge of  
8 her student loans, and that her energy was best put toward regaining  
9 her health so she could get back to work. When the adversary  
10 proceeding was tried on April 27, 2011, Debtor was sixty-four years  
11 old, unemployed, and had no dependents. Her only income was social  
12 security of \$774 per month. Despite living frugally, her monthly  
13 expenses regularly exceeded her income.

14 In reaching its decision to except the FFELP Loans from  
15 Debtor's discharge, the bankruptcy court applied the Brunner<sup>7</sup> test,  
16 which has three prongs. The court had no trouble concluding Debtor  
17 had met the first two prongs. That is, the evidence showed that,  
18 based on her current income and expenses, she could not maintain a  
19 minimal standard of living if forced to repay the FFELP Loans, and,  
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21 <sup>6</sup> Under the present Internal Revenue Code, this forgiveness of  
22 debt would be taxable income, 26 U.S.C. § 61(a)(12), except to the  
23 extent the debtor was, at that time, insolvent. 26 U.S.C.  
§ 108(a)(1)(B), (a)(3), (d)(3).

24 <sup>7</sup> See Brunner v. N.Y. State Higher Educ. Servs., Inc. (In re  
25 Brunner), 831 F.2d 395, 396 (2d Cir. 1987), aff'g and adopting 46  
26 B.R. 752, 756 (S.D.N.Y. 1985).

1 further, additional circumstances indicated it was more likely than  
2 not that her financial difficulties would persist for a significant  
3 portion of the Loans' repayment period. [Trial Tr. at 58:20-59:16].

4 The court, however, struggled with Brunner's third prong,  
5 which, as discussed in detail below, requires that a debtor make  
6 "good faith" efforts to repay the loans. It agreed that Debtor's  
7 participation in the IBRP was not required to find good faith,  
8 because imposing such a requirement would replace rights given under  
9 § 523(a)(8) with those of an administrative remedy. [Id. at 61:2-  
10 17]. Further, in examining past efforts, the court questioned  
11 whether good faith played a role at all when the evidence indicated  
12 that, even assuming best or good faith efforts, Debtor could never  
13 have paid the FFELP Loans in full and in fact, notwithstanding such  
14 efforts, would still be faced with a balance that was an "undue  
15 hardship" to pay. [Id. at 59:17-60:16]. Despite such concerns,  
16 however, the court felt constrained by Ninth Circuit precedent which  
17 it felt required consideration of past efforts to reduce the balance  
18 of the student loan debt. Thus, the court concluded that Debtor's  
19 lack of voluntary payments, and her lack of efforts to renegotiate,  
20 obtain a forbearance, or obtain a disability discharge, tipped the  
21 good faith balance away from her. [Id. at 60:17-24].

## 22 II. JURISDICTION

23 The bankruptcy court had jurisdiction over this proceeding  
24 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction  
25 under 28 U.S.C. § 158(b).  
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**III. ISSUE**

Whether the bankruptcy court erred in concluding that Debtor failed to make a good faith effort to repay her student loans.<sup>8</sup>

**IV. STANDARD OF REVIEW**

Under § 523(a)(8), student loans are excepted from the discharge a debtor receives in bankruptcy unless repaying those loans would "impose an undue hardship on the debtor and the debtor's dependents." In United Student Aid Funds v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998), the Ninth Circuit adopted the three-pronged test set out in Brunner, 831 F.2d at 396, to determine whether the undue hardship standard has been met. The last of those prongs requires the court to determine whether the debtor made "good faith efforts to repay the loans." Id.<sup>9</sup> The primary issue in this

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<sup>8</sup> Contrary to Rule 8006, Debtor did not submit a statement of issues on appeal. However, her opening and supplemental briefs sufficiently identify the issues. ECMC has responded to those issues and has claimed no prejudice from the lack of the Rule 8006 statement. Further, based on the briefs and the record, we are able to completely understand the issues. Debtor may therefore go forward without a separate Rule 8006 statement. Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 166 (9th Cir. BAP 1999).

<sup>9</sup> As referenced above, the first two prongs require a showing:

- (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; and (2)
- that additional circumstances exist indicating that this state of affairs is likely to persist

(continued...)

1 appeal is whether the bankruptcy court erred in reaching its  
2 conclusion on the "good faith" prong. A threshold question is under  
3 what standard should that determination be reviewed. In light of  
4 seemingly contradictory language in Ninth Circuit precedent, we  
5 publish this opinion to clarify the appropriate standard of review.

6 What is clear from the caselaw is that the ultimate undue  
7 hardship determination is reviewed de novo, as it requires a  
8 determination of the "legal effect of the bankruptcy court's  
9 findings regarding the student's circumstances." Educ. Credit Mgmt.  
10 Corp. v. Mason (In re Mason), 464 F.3d 878, 881 (9th Cir.  
11 2006)(quoting Rifino v. United States (In re Rifino), 245 F.3d 1083,  
12 1087 n.2 (9th Cir. 2001)). More particularly, the undue hardship  
13 determination is a mixed question of fact and law. Hedlund v. Educ.  
14 Res. Inst. Inc., 468 B.R. 901, 906 (D. Or. 2012); Educ. Credit Mgmt.  
15 Corp. v. Frushour (In re Frushour), 433 F.3d 393, 398 (4th Cir.  
16 2005); Educ. Credit Mgmt. Corp. v. Blackbird (In re Blackbird), 2008  
17 WL 8444793 at \*3 (9th Cir. BAP 2008).<sup>10</sup> "A mixed question of law  
18 and fact occurs when the historical facts are established; the rule  
19 of law is undisputed . . .; and the issue is whether the facts

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20  
21 <sup>9</sup>(...continued)  
22 for a significant portion of the repayment  
23 period of the student loans.

23 Id.

24 <sup>10</sup> Under Fed. R. App. P. 32.1 and 9th Cir. BAP Rule 8013-  
25 1(c)(2), Blackbird may be cited for its persuasive, but not  
26 precedential, value.

1 satisfy the legal rule." Murray v. Bammer (In re Bammer), 131 F.3d  
2 788, 792 (9th Cir. 1997). Because "[m]ixed questions . . . require  
3 consideration of legal concepts and the exercise of judgment about  
4 the values that animate legal principles," they are reviewed de  
5 novo. Id. De novo review is independent and gives no deference to  
6 the trial court's conclusion. Warfield v. Salazar (In re Salazar),  
7 465 B.R. 875, 878 (9th Cir. BAP 2012).

8 It is also clear that the bankruptcy court's determinations  
9 of the historical facts underlying its undue hardship determination  
10 are reviewed for clear error. Educ. Credit Mgmt. Corp. v. Howe (In  
11 re Howe), 319 B.R. 886, 888 (9th Cir. BAP 2005). The clear error  
12 standard applies to implied as well as express factual findings.  
13 Tighe v. Valencia (In re Guadarrama), 284 B.R. 463, 477 (C.D. Cal.  
14 2002). Review for clear error is "significantly deferential."  
15 Baker v. Mereshian (In re Mereshian), 200 B.R. 342, 345 (9th Cir.  
16 BAP 1996). The appellate court should not reverse unless it is left  
17 with "a definite and firm conviction that a mistake has been  
18 committed." Id. (internal quotation omitted). The reviewing court  
19 may not reverse simply because it is convinced it would have decided  
20 the case differently. Id. "Where there are two permissible views  
21 of the evidence, the fact finder's choice between them cannot be  
22 clearly erroneous." Id. (internal quotation omitted). Further, the  
23 reviewing court must give due regard to the opportunity of the  
24 bankruptcy court to judge the credibility of witnesses. Rule 8013;  
25 Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420, 427 (9th Cir.

1 BAP 2002). "This deference is also given to inferences drawn by the  
2 . . . [bankruptcy] court." Id.

3 To summarize, the ultimate undue hardship determination is  
4 reviewed de novo because it is a mixed question of fact and law, and  
5 the factual findings regarding the circumstances underpinning that  
6 determination are reviewed for clear error. What is not so clear is  
7 the standard of review to be applied to the three individual Brunner  
8 prongs. Are they factual determinations reviewed for clear error or  
9 mixed questions reviewed de novo? In Pa. Higher Educ. Assistance  
10 Agency v. Birrane (In re Birrane), 287 B.R. 490 (9th Cir. BAP 2002),  
11 without discussing the issue, we held, at least by implication, that  
12 the Brunner prongs are mixed questions entitled to de novo review.  
13 Id. at 500-501 (bankruptcy court did not commit an error of law in  
14 applying prong one to those factual findings, but it did err as a  
15 matter of law in applying prongs two and three). Birrane has  
16 subsequently been followed for this proposition. See, e.g.,  
17 Hedlund, 468 B.R. at 913.<sup>11</sup> These holdings, however, do not end the  
18 inquiry as they must be squared with language in Pena, Rifino, and  
19 Mason. In each of those cases, while acknowledging the ultimate  
20 undue hardship determination is a question of law reviewed de novo,  
21 the court nevertheless used "clear error" language in its analysis

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24 <sup>11</sup> Likewise, in Blackbird, an unpublished memorandum, we  
25 expressly held that review of the good faith prong is de novo. 2008  
26 WL 8444793 at \*3.

1 of the individual Brunner prongs.<sup>12</sup> Because the two positions  
2 (i.e., de novo (mixed question) review of the ultimate undue  
3 hardship determination and clear error review of the individual  
4 prongs) are inherently contradictory, we are called to determine  
5 which one must yield. We hold that it must be the latter.

6 The three Brunner prongs are not elements a court throws into  
7 a vial, and then mixes and spins to arrive at an amalgam called

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9 <sup>12</sup> Applying . . . [the Brunner] test,  
10 the bankruptcy court did not clearly err in finding that  
11 (1) the Penas could not maintain a minimal standard of  
12 living and repay their student loans, (2) their  
13 unfortunate financial situation was likely to continue for  
14 a substantial portion of the repayment period, and (3)  
15 they made a good-faith attempt to pay the loans.

16 Pena, 155 F.3d at 1114 (emphasis added).

17 We conclude that the bankruptcy court did not  
18 clearly err in finding that Rifino's standard of  
19 living would fall below a minimal level if she  
20 were required to repay her student loans.

21 . . . .

22 [W]e hold that the bankruptcy court clearly  
23 erred in concluding that Rifino's circumstances  
24 are likely to persist for a significant portion  
25 of the repayment period of her student loans.

26 Rifino, 245 F.3d at 1088-89 (emphasis added).

[W]e conclude that the bankruptcy court clearly  
erred in finding that Mason demonstrated good  
faith efforts to repay his loans.

Mason, 464 F.3d at 885 (emphasis added).

1 "undue hardship." Rather, they are stand-alone requirements.  
2 Failure to prove any one precludes discharge. Carnduff v. U.S.  
3 Dep't of Educ. (In re Carnduff), 367 B.R. 120, 127 (9th Cir. BAP  
4 2007). Thus, if the ultimate undue hardship determination is  
5 reviewed de novo because it is a mixed question, and mixed questions  
6 involve "the exercise of judgment about the values that animate  
7 legal principles," Bammer, 131 F.3d at 792 (emphasis added), it must  
8 then follow that the three independent prongs are also mixed  
9 questions requiring de novo review. If not, and they instead are  
10 simply factual determinations, the reviewing court, upon finding no  
11 clear error as to each prong, would be bound to uphold the  
12 bankruptcy court as to the ultimate undue hardship determination.  
13 Such a mechanical application of the prongs, however, would negate  
14 the reviewing court's ability to "exercise judgment."

15 Our conclusion is buttressed by precedent outside the Ninth  
16 Circuit. Most courts which have directly addressed the issue,  
17 including the Third and Fourth Circuit Courts of Appeals, have held  
18 that each Brunner prong is reviewed de novo. E.g., Educ. Credit  
19 Mgmt. Corp. v. Mosko (In re Mosko), 515 F.3d 319, 324 (4th Cir.  
20 2008); Brightful v. Pa. Higher Educ. Assistance Agency (In re  
21 Brightful), 267 F.3d 324, 327 (3d Cir. 2001); Educ. Credit Mgmt.  
22 Corp. v. Curiston, 351 B.R. 22, 27 (D. Conn. 2006); But see Krieger  
23 v. Educ. Credit Mgmt. Corp., 2013 WL 1442305 at \*2 (7th Cir. April  
24 10, 2013).

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1 then shifts to the debtor, Id., to prove all three Brunner prongs,  
2 Rifino, 245 F.3d at 1087-88, by a preponderance of the evidence.  
3 Nys v. Educ. Credit Mgmt. Corp. v. Nys (In re Nys), 308 B.R. 436,  
4 441 (9th Cir. BAP 2004), aff'd on other grounds, 446 F.3d 938 (9th  
5 Cir. 2006). The bankruptcy court held that Debtor met Brunner's  
6 first two prongs but failed to prove the third. The only issue on  
7 appeal is whether its conclusion as to prong three was in error.<sup>14</sup>

8 As noted, under Brunner's third prong, a debtor must make  
9 good faith efforts to repay the student loans.<sup>15</sup> "Good faith is

10 \_\_\_\_\_  
11 <sup>13</sup>(...continued)  
12 with the exact amount of debt, and may, even disregarding Ms  
13 Swedback's testimony, rely in our analysis on Debtor's stipulation  
14 that the debt was at least \$95,403.86 as of January 5, 2011,  
15 approximately four months before trial.

16 <sup>14</sup> While ECMC, as the prevailing party at trial, could have,  
17 without cross-appeal, defended the bankruptcy court's judgment on  
18 any ground it properly raised below, Valencia, 284 B.R. at 477, it  
19 has chosen not to challenge the bankruptcy court's conclusions as to  
20 the first two prongs.

21 <sup>15</sup> The "good-faith" requirement fulfills the  
22 purpose behind the adoption of section  
23 523(a)(8). Brunner, 46 B.R. at 754-55. Section  
24 523(a)(8) was a response to "a 'rising incidence  
25 of consumer bankruptcies of former students  
26 motivated primarily to avoid payment of  
education loan debts.'" Id., (quoting the  
Report of the Commission on the Bankruptcy Laws  
of the United States, House Doc. No. 93-137, Pt.  
I, 93d Cong., 1st Sess. (1973) at 140 n. 14).  
This section was intended to "forestall students  
. . . from abusing the bankruptcy system." Id.

(continued...)



1 measured by the debtor's efforts to obtain employment, maximize  
2 income, and minimize expenses." Mason, 464 F.3d at 884 (internal  
3 quotation omitted). "Courts will also consider a debtor's effort--  
4 or lack thereof--to negotiate a repayment plan," Id. (internal  
5 quotation omitted), as this is an "important indicator of good  
6 faith." Birrane, 287 B.R. at 499. However, failure to negotiate or  
7 accept an alternative repayment plan is not dispositive. Educ.  
8 Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen), 479 B.R. 79, 89  
9 n.4 (9th Cir. BAP 2012)(debtor's failure to accept ECMC's "Graduate  
10 Repayment Option" was not de facto evidence of a lack of good  
11 faith). Any offered repayment plan's terms, duration, and  
12 consequences need to be examined. Carnduff, 367 B.R. at 136-37.  
13 These consequences include future tax liability and negative credit  
14 ratings. Id.

15 Courts also examine: 1) whether the debtor has made any  
16 payments on the loan prior to filing for discharge, Jorgensen, 479  
17 B.R. at 89, "although a history of making or not making payments is,  
18 by itself, not dispositive[,]" Mason, 464 F.3d at 884 (internal  
19 citation omitted); 2) whether the debtor has sought deferments or  
20 forebearances, East v. Educ. Credit Mgmt. Corp. (In re East), 270  
21 B.R. 485, 495 (Bankr. E.D. Cal. 2001); 3) the timing of the debtor's  
22 attempt to have the loan discharged, Educ. Credit Mgmt. Corp. v.  
23 DeGroot (In re DeGroot), 339 B.R. 201, 214 (D. Or. 2006); and 4)

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24  
25 <sup>15</sup>(...continued)  
26 Pena, 153 F.3d at 1111.

1 whether the debtor's financial condition resulted from factors  
2 beyond her reasonable control, Birrane, 287 B.R. at 500, as a debtor  
3 may not willfully or negligently cause her own default. Id. The  
4 "good faith" obligation continues even after an adversary proceeding  
5 is filed to determine the dischargeability of the student loan debt.  
6 Id.

7           Examining the factors, Debtor did not make any voluntary  
8 payments. However, lack of even minimal voluntary payments is not  
9 lack of good faith if the debtor did not have the financial  
10 wherewithal to make them. England v. United States (In re England),  
11 264 B.R. 38, 48 (Bankr. D. Idaho 2001); Hurley v. Student Loan Acq.  
12 Auth. of Ariz., et. al., (In re Hurley), 258 B.R. 15, 25-26 (Bankr.  
13 D. Mont. 2001). While the bankruptcy court found Debtor was able to  
14 make payments in the "few good earning years" she had [2008 and  
15 2009],<sup>16</sup> [Trial Tr. at 60:12-14], it made no findings as to how much  
16 those payments would have been. The record, however, is complete  
17 enough for us to find that any payment would have been modest as it  
18 is uncontroverted Debtor has never had significant income above  
19 necessary expenses. Veal v. Am. Home Mortg. Servicing, Inc. (In re

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21           <sup>16</sup> In her closing argument, Debtor stated that even though she  
22 made \$40,000 [in 2009], she still had obligations, including a  
23 mortgage, and still had children at home, which is why "she worked a  
24 job and a half." [Trial Tr. at 57:24-58:3]. She further stated in  
25 argument that she had "four kids [she] . . . had to support" when  
26 she moved to Arizona. [Id. at 58:7-8]. We have not considered  
these statements in our factual analysis. United States v.  
Lazarenko, 564 F.3d 1026, 1037 (9th Cir. 2009) (statements in  
argument are not evidence).

1 Veal), 450 B.R. 897, 919 (9th Cir. BAP 2011) (an appellate panel may  
2 conduct review if a complete understanding of the issues may be  
3 obtained from the record as a whole or if there can be no genuine  
4 dispute about omitted findings). Further, implied in the court's  
5 findings as to 2008 and 2009 is a finding, which we will not  
6 disturb, that, except for those years, Debtor was unable to make  
7 voluntary payments. See Johnson Sw., Inc. v. Habert Energy Corp.  
8 (In re Johnson Sw., Inc.), 205 B.R. 823, 827 (N.D. Tex. 1997) ("A  
9 reviewing court may assume that the trial court made an implied  
10 finding consistent with its general holding so long as the implied  
11 finding is supported by the evidence."). Indeed, this inability may  
12 have been due to the DOE's ongoing garnishments and the tax refund  
13 offsets. At least one court has held that making payments through  
14 garnishment or offsets with the debtor's consent demonstrates good  
15 faith. Hamilton v. U.S. Dep't of Educ. (In re Hamilton), 361 B.R.  
16 532, 558 (Bankr. D. Mont. 2007). In this regard, Debtor testified  
17 she did not realize she had two separate lenders and assumed the  
18 FFELP loans were being paid through these forced collection efforts.  
19 The bankruptcy court made no express findings as to Debtor's overall  
20 credibility or her credibility on this particular point. However,  
21 it did accept Debtor's testimony relevant to prongs one and two, and  
22 thus we can infer the court thought Debtor generally credible.  
23 Habert Energy Corp., 205 B.R. at 827. Given this inference,  
24 Hamilton's rationale should also apply to Debtor's good faith, even  
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1 if mistaken, belief she was paying ECMC's predecessor through forced  
2 collection.

3           The bankruptcy court found Debtor made no effort to obtain  
4 forebearances, apparently discounting her testimony that at one  
5 point she mailed foreclosure paperwork to Chicago but never heard  
6 anything afterwards. Given the testimony's lack of detail, we will  
7 not set aside this finding as clearly erroneous.

8           Debtor has admitted she did not attempt to negotiate a  
9 payment plan or make any effort to apply for an administrative  
10 discharge when presented with that option. In mitigation of such  
11 failures, Debtor testified that prepetition she did not know  
12 restructuring arrangements were available. Even were this true, the  
13 evidence shows Debtor to be an intelligent person who, if unsure  
14 about available restructuring options, had the sophistication to  
15 make appropriate inquiries. Her failure to do so was within her  
16 reasonable control. Birrane, 287 B.R. at 500.

17           While the bankruptcy court made no detailed findings as to  
18 the timing of the bankruptcy, the evidence was uncontradicted that  
19 Debtor's attempt to discharge her student loans came at least a  
20 decade after they went into repayment, and thus there was no "rush  
21 to the courthouse." Cf. Brunner, 831 F.2d at 397 (declining to find  
22 good faith when debtor filed adversary proceeding seeking discharge  
23 within a month of when her loans first became due).

24           Likewise the bankruptcy court made no express findings on  
25 Debtor's efforts to obtain employment, maximize income, and minimize  
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1 expenses. However, in holding for her on Brunner's first and second  
2 prongs, the court necessarily found that, at least going forward,  
3 Debtor had minimized her expenses and maximized her earning  
4 potential. Birrane, 287 B.R. at 496 (minimized current expenses are  
5 part of first prong); In re Nys, 446 F.3d at 947 (maximized income  
6 potential (which subsumes possibility of obtaining more lucrative  
7 employment) part of second prong). Given the evidence on Debtor's  
8 frugality, education, age, health, earning potential, and desire to  
9 work, these findings are not clearly erroneous. As to Debtor's  
10 historical efforts, ECMC does not dispute them. In any event, the  
11 record is sufficiently developed to allow us a complete  
12 understanding, Veal, 450 B.R. at 919, and upon our review, the  
13 preponderance of the evidence indicates Debtor: 1) remained full-time  
14 employed until shortly before she filed Chapter 7, often working two  
15 jobs; 2) used her job skills as productively as she could; and 3)  
16 lived frugally, all indicating historical good faith efforts to  
17 obtain employment, maximize income, and minimize expenses.

18 Thus, to sum up the factual findings underlying the good  
19 faith analysis, Debtor made good faith efforts to obtain employment,  
20 maximize income, and minimize expenses. Further, she did not come  
21 to bankruptcy court seeking discharge until many years after the  
22 loans were in repayment status. In contrast, she made no full or  
23 even partial voluntary payments despite being able to do so in  
24 select years. However, this deficiency is mitigated somewhat by her  
25 good faith belief in other years that the FFELP Loans were being  
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1 paid through garnishments and tax offsets. Further, she did not  
2 seek forebearances. However, a forbearance would merely have  
3 deferred payment, and, given Debtor's limited finances, would not  
4 have materially improved her prospects to pay on her loans. She  
5 also did not submit an application to administratively discharge the  
6 loan, claiming she did not meet the eligibility requirements for  
7 that program. That claim has not been contradicted, and we will not  
8 hold against her the failure to engage in a futile exercise.

9           Finally and perhaps of most significance, Debtor refused to  
10 enroll in the IBRP. In light of Ninth Circuit caselaw, we cannot  
11 discount this refusal. In fact, it has often tipped the good faith  
12 balance against a debtor. See, e.g., Mason, 464 F.3d at 885  
13 (failure to enroll in the ICRP); Birrane, 287 B.R. at 500 (same).  
14 The question is whether, in light of Debtor's individual  
15 circumstances, Rifino, 245 F.3d 1087 n.2, it should do so here. The  
16 evidence and the bankruptcy court's findings show that not only  
17 would Debtor currently not be required to make a payment under the  
18 IBRP, but it is more probable than not she would never be required  
19 to make a payment. Given that forecast, which is not clearly  
20 erroneous, we conclude that Debtor's refusal to participate in the  
21 IBRP should not be weighed against her, especially given her age,  
22 poor health, and limited income or prospects.

23           Potentially disastrous tax consequences could await her at  
24 the termination of the twenty-five year payment period or could  
25 await her estate and thus her heirs upon her death. Perhaps more  
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1 concretely, we see no real purpose in making Debtor jump through the  
2 hoops of applying for, and enrolling in, the IBRP and then reporting  
3 her income every year. The IBRP was set up to allow borrowers to  
4 pay an affordable amount toward retirement of their student loan  
5 debt. However, when absolutely no payment is forecast, the law  
6 should not impose negative consequences for failing to sign up for  
7 the program. This is consistent with the general maxim that the law  
8 does not require a party to engage in futile acts. Ohio v. Roberts,  
9 448 U.S. 56, 74 (1980), abrogated on other grounds, Crawford v.  
10 Washington, 541 U.S. 36 (2004). Congress could not have intended  
11 such a lengthy, empty commitment as a requirement for a  
12 determination of undue hardship.

#### 13 VI. CONCLUSION

14 In the end, we must, in our de novo review, weigh the  
15 bankruptcy court's factual findings (which were not clearly  
16 erroneous) and our own findings (given the completeness of the  
17 record) in "exercis[ing] [our] . . . judgment about the values that  
18 animate," Bammer, 131 F.3d at 792, "good faith efforts to repay."  
19 Although a close case, in considering all the factors, we conclude  
20 Debtor has met her burden. We therefore REVERSE and REMAND this  
21 matter to the bankruptcy court with instructions that it enter  
22 judgment discharging the FFELP Loans.

23  
24 Concurrence begins on next page.

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1 PAPPAS, Bankruptcy Judge, Concurring:

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3           Given the bankruptcy court's fact findings regarding Debtor's  
4 dismal financial history and circumstances, and applying a de novo  
5 standard of review, I concur that the bankruptcy court erred in  
6 declining to grant a hardship discharge of the student loan debt to  
7 Debtor under § 523(a)(8). However, because I understand how the  
8 bankruptcy court felt restricted by precedent in reaching its  
9 decision, I write separately to highlight that the analysis required  
10 by Pena/Brunner to determine the existence of an undue hardship is  
11 too narrow, no longer reflects reality, and should be revised by the  
12 Ninth Circuit when it has the opportunity to do so. Put simply, in  
13 this era, bankruptcy courts should be free to consider the totality  
14 of a debtor's circumstances in deciding whether a discharge of  
15 student loan debt for undue hardship is warranted.

16           Congress has never defined the circumstances constituting the  
17 sort of undue hardship justifying the discharge of an educational  
18 debt under § 523(a)(8), apparently preferring that bankruptcy courts  
19 craft a working definition. While it might have been appropriate  
20 and helpful when adopted, respectfully, the Brunner test for  
21 determining undue hardship is truly a relic of times long gone.

22           Brunner was decided by the Second Circuit in 1987 to  
23 implement the original student loan hardship discharge exception  
24 included in a still-new Bankruptcy Code. Brunner v. N.Y. State  
25 Higher Educ. Serv. Corp., 831 F.2d 395, 396 (2d Cir. 1987). That



1 early version of § 523(a)(8) provided that a debtor's student loan  
2 debt could not be discharged unless either it first became due five  
3 years before the date of the bankruptcy filing or excepting such  
4 debt from discharge would impose an undue hardship on the debtor and  
5 the debtor's dependents. Importantly, in those days, without regard  
6 to the debtor's current finances, if a student loan had not been  
7 collected within the five years after it became due, Congress  
8 directed that it would be discharged in the student's bankruptcy  
9 case.

10 Brunner typified the sort of student loan discharge cases  
11 encountered by bankruptcy courts at that time. The debtor sought to  
12 discharge \$9,000 in student loans in a bankruptcy case filed just a  
13 few months after she obtained her master's degree, immediately after  
14 the grace period before payments became due expired, after only a  
15 few months of unemployment, and having made no efforts to pay  
16 anything on the loans. Brunner v. N.Y. State Higher Educ. Serv.  
17 Corp. (In re Brunner), 46 B.R. 752, 753 (S.D.N.Y. 1985), aff'd, 831  
18 F.2d 394 (2d Cir. 1987). Not surprisingly, in addition to  
19 articulating its now-famous "test," the Brunner court held that the  
20 debtor had not made a case for an undue hardship discharge in part  
21 because, given her circumstances, she had not made a good faith  
22 effort to repay the modest debt. 831 F.2d at 396-97.

23 In 1990, Congress amended § 523(a)(8), significantly  
24 expanding the discharge exception to apply to more than just  
25 educational "loans" to include any "educational benefit,  
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1 scholarship, or stipend payment." Crime Control Act of 1990, Pub.  
2 L. No. 101-647 (1990). The discharge exception was further widened  
3 to encompass any obligation "that first became due more than 7 years  
4 (exclusive of any extension of the repayment period) before the date  
5 of filing of the [bankruptcy] petition." Id. This was the version  
6 of the Code applied by the Ninth Circuit when it adopted the Brunner  
7 test for undue hardship in In re Pena in 1998. United Student Aid  
8 Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir.  
9 1998).

10 In In re Pena, the court affirmed the grant of a hardship  
11 discharge of the debtor's \$9,300 in student loans used to acquire  
12 technical training that the court described as "useless" to him in  
13 obtaining employment. 155 F.3d at 1110. Moreover, Mrs. Pena  
14 suffered from a chronic mental disability, the debtors' income was  
15 inadequate to pay their normal living expenses, and there was no  
16 evidence that their situation would improve in the future. Under  
17 these facts, and applying the Brunner factors (or any other test,  
18 for that matter), the decision to grant the debtors a hardship  
19 discharge of the student loans is certainly defensible.

20 Over the years, Congress made more changes to § 523(a)(8),  
21 all excepting a broader array of educational obligations from  
22 discharge in bankruptcy. For example, in 1998, Congress did away  
23 with the requirement that only those student loan debts that were  
24 less than seven years into the repayment period could be excepted  
25 from discharge in bankruptcy. See Higher Education Amendments of  
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1 1998, Pub. L. No. 105-244, § 971(a) (1998). Under this amendment,  
2 student-debtors could no longer hope to discharge even the oldest of  
3 their educational obligations without demonstrating that repayment  
4 would constitute an undue hardship to them or their dependents.

5 Most recently, in 2005, under pressure from lenders and  
6 lobbyists, Congress expanded the discharge exception to include, for  
7 the first time, private student loans. Given the geometric  
8 increases in the amount of new and outstanding educational loans,  
9 this change to § 523(a)(8) meant that the pool of potentially  
10 nondischargeable education-related debts was now a truly huge one.

11 As can be seen, while at one time bankruptcy courts were  
12 required to focus on a debtor's circumstances only during the five  
13 to seven years after student loans became due, after 1998, the  
14 relevant time for examining whether a debtor had made good faith  
15 efforts to repay a student loan had no limits. And after the 2005  
16 amendment, the number and kinds of student loan debts potentially  
17 excepted from discharge skyrocketed.

18 In addition to these significant changes in the statutory  
19 landscape, educational borrowing has also changed drastically since  
20 the Brunner test was formulated and In re Pena adopted it. Back  
21 then, bankruptcy courts only infrequently dealt with student loan  
22 discharge issues, and as shown by the facts of those cases, the  
23 amounts in controversy were usually modest. As a practical matter,  
24 if a student loan was excepted from discharge, the debtor could be  
25 expected to repay it within a reasonable time.

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1           But things are different now. Unlike the loans made mostly  
2 to traditional students by local banks and colleges in the 1970s,  
3 today, a variety of lenders now compete to provide "financial  
4 assistance" for a broad assortment of study and training, without  
5 regard to the wisdom of a student's decision to borrow or their  
6 particular circumstances, and with nary a thought given to the  
7 borrower's ability to repay the debts. Today, facing the mammoth  
8 costs of a modern education, nearly all students must borrow heavily  
9 to finance their futures. Much of that student loan debt is not  
10 incurred to finance a traditional college education, but instead  
11 goes to pay for other types of training, frequently delivered by  
12 "for-profit" companies, which may not significantly improve the  
13 debtor's chances for employment or substantial earnings.  
14 Astoundingly, today there is nearly \$1 trillion in outstanding  
15 educational debt, see Donghoon Lee, Household Debt and Credit:  
16 Student Debt at 2 (Federal Reserve Bank of New York, Feb. 28, 2013),  
17 <http://newyorkfed.org/newsevents/mediaadvisory/2013/Lee022813.pdf>;  
18 the average student loan balance is close to \$25,000, Id. at 7; and  
19 over 12 percent of borrowers owe \$50,000 or more. Id. at 6. On the  
20 heels of a record recession with high unemployment, it is not  
21 surprising that many of the students who borrowed to finance their  
22 education and training did not complete those programs. It is also  
23 hardly surprising that the proportion of student loans that are  
24 delinquent is at near-record high levels. Id. at 11 and 15

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1 (explaining that 17 percent of borrowers in repayment programs are  
2 ninety-plus days delinquent).

3         As with the debtor in this appeal, many outstanding student  
4 loan debts are now decades old, owed by borrowers who never really  
5 had the ability to make substantial payments on the balances. Id.  
6 at 4 (noting that 34 percent of all student loans are 40 years old  
7 or older). And so, with accruing interest, those loan balances grow  
8 large. It is also increasingly common that the debtor seeking  
9 bankruptcy relief from student loan debt is not the student but,  
10 instead, a family member or friend who agreed to co-sign or  
11 guarantee the loans.

12         Unlike in Brunner and Pena, today, bankruptcy courts must  
13 frequently attempt to predict a debtor's potential to repay a six-  
14 digit educational obligation over his or her entire lifetime. In  
15 many of those cases, the benefit the debtor received from the  
16 education or training financed with these "loans" may be marginal,  
17 and the balances due to creditors exceed the debtor's debt-service  
18 abilities. It would seem that in this new, different environment,  
19 in determining whether repayment of a student loan constitutes an  
20 undue hardship, a bankruptcy court should be afforded flexibility to  
21 consider all relevant facts about the debtor and the subject loans.  
22 But Brunner does not allow it. In addition to requiring that a  
23 debtor demonstrate a current inability to pay a student loan while  
24 maintaining a minimal standard of living, Brunner mandates that the  
25 debtor show "additional circumstances" to prove that his or her  
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1 impecunious status will persist into the future. Brunner, 831 F.2d  
2 at 396; Pena, 155 F.3d at 1111. Requiring that a debtor demonstrate  
3 that his or her financial prospects are forever hopeless is an  
4 unrealistic standard.

5 Brunner's additional requirement that a debtor show that he  
6 or she has made "good faith efforts" to repay a student loan is also  
7 of little utility in determining true undue hardship. Of course, as  
8 a matter of statutory construction, this "prong" of the test lacks  
9 any textual basis in the Bankruptcy Code. As a practical matter,  
10 requiring a debtor to clear this hurdle can condemn the student-  
11 borrower to a lifetime of burdensome debt under one or more of the  
12 creditors' long-term repayment programs, some of which may span  
13 thirty-to-forty years. This aspect of the Brunner test also fails  
14 to account for the potentially devastating debt-forgiveness tax  
15 consequences to the debtor resulting from the "successful"  
16 completion of such a program, which is one reason that the repayment  
17 programs are not that popular with borrowers. At bottom, requiring  
18 debtors to participate in these creditor programs as a condition to  
19 obtaining a bankruptcy discharge simply means that creditors, not  
20 bankruptcy judges, will decide which loans can be repaid, and which  
21 should properly be forgiven. This is surely not what Congress  
22 intended in enacting § 523(a)(8).

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1           The Ninth Circuit should reconsider its adherence to Brunner.  
2 It should instead, like a few other courts,<sup>17</sup> craft an undue  
3 hardship standard that allows bankruptcy courts to consider all the  
4 relevant facts and circumstances on a case-by-case basis to decide,  
5 simply, can the debtor currently, or in the near-future, afford to  
6 repay the student loan debt while maintaining an appropriate  
7 standard of living. This approach could allow the bankruptcy court,  
8 after weighing the facts of each case, to decide that a student-  
9 debtor, whose debt financed training that did not allow him or her  
10 to achieve any significant earnings, to discharge a large loan  
11 balance even in the absence of a debilitating illness or handicap.  
12 It could allow an elderly debtor to escape the burden of decades-old  
13 student loans when her prospects for repayment have disappeared,  
14 even though the debtor has not participated in a repayment plan with  
15 the creditor. And this hardship test would focus on the  
16 contemporary world of student loan debt, not circumstances that  
17 existed thirty or more years ago.

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20           <sup>17</sup> To be sure, Brunner still predominates in the circuits as  
21 the go-to test for assessing undue hardship. The advantages to the  
22 more timely and enlightened "totality of circumstances" approach is  
23 explained in the First Circuit BAP's decision in Bronsdon v. Educ.  
24 Credit Mgmt. Corp. (In re Bronsdon), 435 B.R. 791 (1st Cir. BAP  
25 2010); see also Long v. Educational Credit Mgmt. Corp. (In re Long),  
26 322 F.3d 549, 554 (8th Cir. 2003) (observing that "fairness and  
equity require each undue hardship case to be examined on the unique  
facts and circumstances that surround the particular bankruptcy  
[case].").

1           As America's experience in the recent "mortgage crisis"  
2 should have taught us, employing an undue hardship discharge test  
3 that requires those who cannot repay educational loans, most of  
4 which are government-backed, to attempt to do so creates problems  
5 for all. Under § 523(a)(8), Congress did not draw bright lines, but  
6 instead presumably intended that bankruptcy courts have the  
7 flexibility to make fact-based decisions in individual cases about  
8 the need for student loan debt relief. Pena/Brunner restricts the  
9 bankruptcy courts' ability to do so, and its application in the  
10 Ninth Circuit should be reconsidered.

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