



Signed and Filed: June 29, 2010

*Dennis Montali*

DENNIS MONTALI  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	)	Bankruptcy Case
	)	No. 05-34722DM
MARGE E. HEALY,	)	
	)	
	)	Debtor.
	)	Chapter 7
	)	
MARGE E. HEALY,	)	Adversary Proceeding
	)	No. 09-3033DM
	)	Plaintiff,
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
EDUCATION, EDUCATIONAL CREDIT	)	
MANAGEMENT CORPORATION, JFK	)	
UNIVERSITY, and E.C.S.I.,	)	
	)	
	)	Defendants.

MEMORANDUM DECISION FOLLOWING TRIAL TO  
DETERMINE DISCHARGEABILITY OF STUDENT LOAN

I. INTRODUCTION

On May 3, 2010, the court conducted a trial on the complaint of plaintiff Marge E. Healy ("Healy") against defendant Educational Credit Management Corporation ("ECMC"). Healy appeared and was represented by Cheryl C. Rouse, Esq. and Norman P. Bahlert, Esq., her attorneys; ECMC appeared and was represented by Miriam Hiser, Esq., its attorney.

For the reasons discussed below, the court concludes that Healy is not entitled to discharge her debt to ECMC.

1 II. FACTS<sup>1</sup>

2 Healy owes ECMC, the present holder of loans (the "ECMC  
3 loans"), at least \$141,534.92. The ECMC loans are educational  
4 loans that are subject to a test for dischargeability under 11  
5 U.S.C. § 523(a)(8), which presumes that such educational loans are  
6 nondischargeable unless the debtor can demonstrate that the  
7 payment would be an undue hardship.

8 Healy is almost seventy-four years old. She incurred ECMC  
9 loans between June, 1990 and July, 1993; the principal amount  
10 originally loaned was \$45,749.

11 During 1996 and 1997, Healy paid approximately \$1,700 on  
12 account of the ECMC loans and more recently suffered a wage  
13 garnishment in the amount of \$677.70 and a social security offset  
14 of \$229.80 applied to the same loans. She also paid \$854.61 in  
15 respect of other educational loans not held by ECMC.

16 She made no voluntary payments on account of the ECMC loans  
17 after 1997 and she filed Chapter 7 in this court on October 14,  
18 2005. This adversary proceeding was commenced nearly 3-1/2 years  
19 later, on February 23, 2009.

20 For the years 2007, 2008 and 2009, Healy's adjusted gross  
21 income ("AGI") reported on her federal tax returns was \$15,789,  
22 \$17,201 and \$32,027, respectively. The increase in her income for  
23 2009 is largely attributed to a nine month temporary employment  
24 situation (through March 28, 2010) wherein she was able to earn  
25 just under \$20 an hour and worked thirty-five hours a week,  
26 compared to \$14.50 an hour for shorter work weeks in other periods

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28 <sup>1</sup> The following discussion constitutes the court's findings  
of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 while working on an "on-call" situation. Healy expects that her  
2 AGI for 2010 will approximate the amount she reported in 2007 and  
3 2008.

4 After filing her Chapter 7 bankruptcy in 2005, Healy incurred  
5 debt on four credit cards. She presently owes \$7,512 on them and  
6 budgets monthly payments on those four debts totaling \$340. The  
7 record does not reflect what Healy used the post-petition credit  
8 card advances for, but the court presumes they were for Healy's  
9 routine living expenses or perhaps in connection with a small  
10 business activity that she has operated at a loss for the last few  
11 years.

12 ECMC argues that Healy should avail herself of either the  
13 Income Contingent Repayment Program ("ICRP") or a more favorable  
14 Income Based Repayment Program ("IBR"). Based upon Healy's AGI  
15 for 2007 and 2008, her ICRP payments would be just under \$103 and  
16 IBR payments would be \$10; for the 2009 AGI, her ICRP payment  
17 would be \$353.28 and her IBR payment would be \$197.28.

### 18 III. DISCUSSION

19 The parties have thoroughly briefed, and are quite familiar  
20 with the Ninth Circuit's requirements set forth in the United  
21 Student Aid Funds, Inc. v. Pena, (In re Pena) 155 F.3d 1108 (9th  
22 Cir. 1998), namely that a debtor seeking to discharge an  
23 educational loan under section 523(a)(8) must establish that she  
24 cannot maintain a minimum standard of living, based on current  
25 income and expenses, if forced to repay the loan; that additional  
26 circumstances exist such that the state of affairs is likely to  
27 persist; and that she has made a good faith effort to repay the  
28 loan. All three elements of the Pena test must be proven.

1 Healy has established without serious debate that she has  
2 satisfied the second prong of Pena based upon her age, her  
3 deteriorating health, and a dismal prognosis for increased income  
4 in the future. Unfortunately for Healy, the availability of the  
5 IBR convinces the court that she has not satisfied the first prong  
6 of the Pena test because, based upon her current income and  
7 expenses, she would be able to make the IBR payments on her debt  
8 to ECMC.

9 The court reaches this conclusion by declining to take into  
10 account the \$340 per month Healy is obligated to pay the issuers  
11 of four post-petition credit cards. The court agrees with the  
12 decision of the bankruptcy court in the Zygarewicz case (Case No.  
13 05-31918-a-7 Bankr. (E.D. Cal.)), filed January 15, 2010, namely  
14 that given such a long period of time between Healy's petition  
15 date and the date of this adversary proceeding, the post-petition  
16 credit card debt may not be considered. Rather, the circumstances  
17 of the debtor's financial affairs must be taken into on or about  
18 the time of entry of discharge. Applying that court's reasoning,  
19 to allow events that have occurred many years later would amount  
20 to a "perpetual license to discharge student loan debts based on  
21 events that occurred years after the bankruptcy discharge is  
22 granted."

23 Healy's strongest argument about avoiding the IBR is that her  
24 2009 AGI will force her into an impossible situation of requiring  
25 payments of as much as \$197.28. Her prior recent employment  
26 history and likely future employment situation (AGI below \$20,000)  
27 will result in an IBR payment of \$10.

28 Assuming that Healy could enroll in the IBR immediately and

1 thus would be required to submit her 2009 AGI as a starting point,  
2 her current income and expenses suggest that \$197.28 might be too  
3 onerous. But that over states the problem and ignores reality.  
4 First, Healy must go through several steps. As set forth in  
5 ECMC's post-trial brief, the ECMC loans, at present being in a  
6 default situation, are not eligible for IBR. First Healy must  
7 consolidate her loans through the William D. Ford Federal Direct  
8 Loan Program. After that she can elect a repayment program under  
9 the IBR.

10 Healy has not explained how long that will take and ECMC's  
11 counsel has pointed out in her post-trial brief that the process  
12 was explained in a letter of November 9, 2009, that is not in  
13 evidence. The court presumes that if Healy were to proceed to  
14 consolidate through the Ford Program and then apply for IBR, by  
15 the time she became fully qualified under IBR she would either be  
16 obligated to pay the \$197.28 figure for no more than two or three  
17 months and then, upon submission of her 2010 federal tax return  
18 with the expected lower AGI, she would qualify for a considerable  
19 lower payment.<sup>2</sup>

20 From the foregoing the Court concludes that with Healy's  
21 current and projected income, while modest, and her expenses,  
22 while not unreasonable (except for the credit cards payments), she  
23 could make the extremely small payments under IBR. Thus on the  
24 record presented, Healy has not satisfied the first prong of  
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27 <sup>2</sup>If necessary, the court would consider staying the  
28 effectiveness of the judgment of non-dischargeability in favor of  
ECMC until the end of 2010.

1 Pena.<sup>3</sup>

2 Because the first prong of Pena has not been satisfied, the  
3 court need not decide the third prong although Healy's failure to  
4 make any payments for over twelve years, and her failure to  
5 consider the IBR, do suggest the good faith standard of Pena might  
6 not have been satisfied.<sup>4</sup>

7 Finally, the court is mindful of the fact that Healy's  
8 counsel has argued that even if she is able to live an additional  
9 twenty-five years (certainly not within any reasonable actuarial  
10 expectancy) and fully performs under the twenty-five year term of  
11 the IBR, she will be saddled with either the remaining debt, or  
12 some sort of a speculative tax on debt forgiveness that she will  
13 carry to her grave. The court accepts ECMC's argument that such  
14 an outcome is highly speculative and not determinative of the  
15 outcome reached here.

16 IV. CONCLUSION

17 Counsel for ECMC should submit a form of judgment declaring  
18 the ECMC debt nondischargeable for the reasons stated in this  
19 Memorandum Decision. Before doing so, counsel for both sides  
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23 <sup>3</sup>The court appreciates Healy's counsel's argument about the  
24 reality that no matter what program Healy participates in, she  
25 will never, ever pay down any of the principal on the ECMC loans.  
26 While a novel argument, the law requires the court to consider  
whether payments can be made, not how those payments will be  
applied by ECMC.

27 <sup>4</sup>In making the foregoing point, the court does not attribute  
28 to Healy any bad faith. In fact, the court is sympathetic to her  
plight. The "bad faith" test in Pena is a legal term that simply  
applies under these circumstances.

1 should meet and confer about a consensual form of judgment that  
2 stays the effectiveness of the judgment until January, 2011.

3 \*\*END OF MEMORANDUM DECISION\*\*  
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