

I

The debtor, Joseph Thomas Ascue, a physician, filed a Chapter 7 petition in the bankruptcy court on August 26, 1997. In the course of those proceedings, the United States filed a complaint to determine the dischargeability of a judgment debt owed to it by Dr. Ascue in the amount of \$512,688.95, resulting from a government scholarship awarded to him to attend medical school, from which he graduated in 1984. This National Health Service Corps (“NHSC”) scholarship required Dr. Ascue to complete a period of service in a health professional shortage area following his education. Dr. Ascue did not comply with the service requirement and the United States obtained a judgment against him in this court on January 20, 1994. The amount of the original scholarship was only \$42,017, but the judgment represented liquidated damages, together with accumulated interest and charges, all as permitted by statute. No amounts have been paid on the judgment.

An evidentiary hearing was held by the bankruptcy court on the question of dischargeability on May 18, 2000. At the conclusion of the hearing, the court left the record open and conducted further conferences with the parties over the next several months. No further evidence was presented, however, and on October 24, 2001, the bankruptcy court issued its decision,¹ determining that the debt was nondischargeable

¹ *Ascue v. United States (In re Ascue)*, 268 B.R. 739 (Bankr. W.D. Va. 2001).

to the extent of \$126,051, but discharging the balance.² The bankruptcy court also entered judgment in favor of the United States for this principal amount, together with interest from the date of the judgment.³

The United States filed a timely appeal. The debtor filed a timely motion to alter or amend judgment, which the bankruptcy court denied by order entered November 9, 2001, and the debtor thereafter noted an appeal of the bankruptcy court's refusal to fully discharge the debt.⁴ The appeals, which have been consolidated, have been fully briefed and are ripe for decision.⁵

II

The NHSC Scholarship Program, first enacted in 1976, provides government medical scholarships in return for promises by the participants to serve for a period of time (equal to one year for each scholarship school year) in a health professional shortage area as assigned by the Secretary of Health and Human Services.⁶ If a

² *See id.* at 748-49.

³ *See id.*

⁴ This court has jurisdiction pursuant to 28 U.S.C.A. § 158(a)(1) (West Supp. 2001).

⁵ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

⁶ *See* Pub. L. No. 94-484, 90 Stat. 2270 (1976) (codified at 42 U.S.C.A. § 2541 (West 1991)).

participant fails to begin the service obligation, the United States is entitled to recover three times the amount of the scholarship as damages.⁷ This debt may be discharged in bankruptcy only if the discharge is granted after the expiration of five years from the date the damages are first due, and “only if the bankruptcy court finds that nondischarge of the obligation would be unconscionable.”⁸

Unconscionable is that which is “shockingly unfair, harsh or unjust.”⁹ It must be determined by the totality of the circumstances, including the debtor’s financial situation and future prospects, his health, the size of the debt, and his prior good faith efforts to repay it.¹⁰

The parties do not contest the bankruptcy court’s legal formulation of the appropriate factors to consider, or the bankruptcy court’s holding that the plain language of the statute permits a partial—as well as a total—discharge of the debt. Instead, the United States argues that the bankruptcy court erred “in giving undue weight to Dr. Ascue’s unsupported claims that he cannot work Simply put, there was no credible evidence before the court that [Ascue’s] health is so compromised that

⁷ See 42 U.S.C.A. § 254o(b)(1)(A) (West 1991).

⁸ *Id.* at § 254o(d)(3)(A) (West 1991).

⁹ *Ascue v. United States (In re Ascue)*, 268 B.R. at 744 (citations omitted).

¹⁰ See *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149-50 (6th Cir. 1996).

he can never again produce income”¹¹ On the other hand, Dr. Ascue argues that because of his health problems, the bankruptcy court should have discharged the entire debt.

In its opinion, the bankruptcy court carefully reviewed the evidence presented by the parties. That evidence showed, as the bankruptcy court found, that even though Dr. Ascue earned substantial income as a physician for the years 1992 through 1997, he “utterly failed to fulfill his service obligations or to make payments on the debt.”¹² Nevertheless, the bankruptcy court found that the debtor’s current financial situation and his limited future prospects because of his health, together with the size of the debt, made it appropriate to discharge at least a portion of the indebtedness. The bankruptcy court thus discharged all of the debt except for \$126,051, which sum represented three times the amount of the original scholarship.¹³

Whether a debt is unconscionable is a question of law, which this court reviews de novo.¹⁴ However, to the extent that certain historical facts were determined by the

¹¹ Br. at 11.

¹² 268 B.R. at 745.

¹³ *Id.* at 748.

¹⁴ *See Rice v. United States (In re Rice)*, 78 F.3d at 1148.

bankruptcy court in connection with its resolution of the legal issue, I must give deference to those facts, based as they are on judgments of credibility.¹⁵

The government's basic position on appeal is its skepticism as to the claimed extent of the debtor's health problems. Dr. Ascue testified before the bankruptcy court that because of two accidents involving his neck, he had "no feeling" in his dominant hand, and that his neck and shoulder on his left side were in constant pain.¹⁶ He testified that the nerve damage was permanent and that he could never practice medicine again.¹⁷ In 2001 the Social Security Administration declared him disabled because of a herniated cervical disc, although his earnings after 1999 precluded him from continued social security benefits.¹⁸

The government argues that Dr. Ascue's "conclusory statements" about his ability to work were uncorroborated and thus should not have been accepted by the bankruptcy court. However, the bankruptcy court did not determine that Dr. Ascue could never work at any job. The bankruptcy court simply accepted the debtor's largely uncontested evidence that he had a serious and long-lasting health problem that

¹⁵ See *In re Malloy*, 155 B.R. 940, 945 (E.D. Va. 1993), *aff'd*, No. 93-2020, 1994 WL 173485, at *1 (4th Cir. May 9, 1994) (unpublished).

¹⁶ See Tr. at 22-23.

¹⁷ See *id.* at 32.

¹⁸ See Pl.'s Ex. D.

imposed a significant barrier to payment of a debt of the size claimed by the government. That finding by the bankruptcy court was not clearly erroneous and supported the legal decision that partial discharge of the debt was justified, even though the debtor failed to pay toward the debt when he had the earning capacity to do so.¹⁹

In Dr. Ascue's appeal, he naturally agrees that he has a significant disability, but disagrees with the weight that the bankruptcy court placed on that aspect of the case. However, even if Dr. Ascue were more disabled than the evidence shows, the fact that he evidenced such lack of good faith in his past attitude toward the debt would justify refusing to discharge the entire debt. It is not unconscionable under the circumstances to hold Dr. Ascue responsible for a significant amount of the debt, in light of his past refusal to live up to his contract.

Based on the bankruptcy court's findings, and after a de novo review of its legal decision, I find that the bankruptcy court's balancing of the relevant factors led to a proper decision, and thus I will affirm its orders.

A separate judgment consistent with this opinion is being entered herewith.

¹⁹ The bankruptcy court also received into evidence certain medical reports concerning Dr. Ascue's condition (Tr. at 29), but those exhibits were not designated by the parties as part of the record on appeal and are not before me. The government asserts that those reports do not support the bankruptcy court's finding (Br. at 16), but of course I cannot make that assumption.

DATED: February 6, 2002

United States District Judge