

November 12, 2003

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE CARLA DAWN HADDOX,
Debtor.

BAP No. WO-03-048

CARLA DAWN HADDOX,
Appellant,

Bankr. No. 00-20020-NLJ
Chapter 13

v.

ORDER AND JUDGMENT*

H. ALLEN JOHNSON,
Appellee.

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before McFEELEY, Chief Judge, NUGENT, and McNIFF, Bankruptcy Judges.

NUGENT, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Appellant Carla Dawn Haddox, a Chapter 13 debtor, appeals from an Order Granting Motion to Delete Provision From Plan Summary. Appellant argues that the bankruptcy court erred when it granted a motion filed by her attorney, H. Allen Johnson (“Johnson”) to remove from her already-confirmed plan a provision that provided for the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

abatement of guaranteed student loan interest during the life of the plan and subsequent discharge upon completion of the plan. We agree with the Appellant that the bankruptcy court erred when it forced the Appellant's attorney to modify the confirmed plan and REVERSE.

I. Background

On December 8, 2000, Appellant filed her Chapter 13. With the Petition, she filed her schedules, Chapter 13 Plan ("Plan") and Plan Summary. The Plan and the Plan Summary were prepared by Johnson. The Plan provided that "[t]he 'Plan Summary' . . . together with all remarks and other notations thereon is incorporated in and made part of this plan. Included in the Plan Summary was the following:

Special Plan Provisions: 1. U.S. Dept. of Education Direct Loan Program and Graduate Loan Center: These student loans will be paid as unsecured over the term of the ch. 13 & *all interest will abate during the term of the ch. 13 proceeding & upon discharge the remaining principal will be due, less all amounts paid through the ch. 13 plan*; provided, these creditors must file a claim showing that the debt is, in fact, a student loan qualifying as non-dischargeable under a government program per 11 USC § 523(a)(8) and further debtor provides that she retains the availability of 11 USC § 523(a)(8) to bring an adversary proceeding affecting the debtor to be discharged, if, in fact, she ascertains that excepting this debt from discharge will impose an undue hardship upon her and her dependant.¹

There were no objections to this provision ("Provision 1"). An Order Confirming the Plan was signed by the presiding bankruptcy judge on January 10, 2001 ("Confirmation Order"). The Confirmation Order does not mention Provision 1. The Confirmation Order was not appealed.

In 2002, the bankruptcy judge who had heard the Debtor's case retired. Subsequently, a new bankruptcy judge was appointed.

In November 2003, in an unrelated case, *In re Lemons*,² the new presiding bankruptcy judge entered orders sanctioning Johnson for proposing a Chapter 13 plan

¹ Plan at 2, *in* Appellant's App. at 2. (Emphasis added).

² See *In re Lemons*, 285 B.R. 327 (Bankr. W.D. Okla. 2002).

with language similar to that found in Provision 1 (“Sanction Order”) on the grounds that the language violated § 523(a)(8) of the Bankruptcy Code. Under the Sanction Order, Johnson was required to purge all offending language from any plans Johnson had prepared. Subsequently, Johnson filed an Application to Clarify in *Lemons* seeking guidance about what action Johnson was to take in confirmed cases. On February 8, 2003, the bankruptcy court issued an Order Clarifying Order Imposing Sanctions, which provides inter alia:

Just as counsel was directed to purge the offending language from proposed plans in pending cases, *counsel is also directed to purge the offending language from the plans in confirmed cases in which the debtor has not yet completed payments and received a discharge.* Counsel can accomplish this most expediently by moving to modify the plan to delete any language in the plan or that is incorporated into the plan that purports to discharge a student loan obligation and/or to abate the accrual of interest on student obligations during the pendency of the bankruptcy, and/or to discharge collection expenses and penalties upon completion of payments under the plan.³

On February 25, 2003, in Appellant’s case Johnson filed a “Motion to Delete Provision in the Plan Summary and Incorporated into the Confirmed Plan Whereby Accruing Interest Abates on Nondischargeable Student Loans over the Term” (“Motion”). Appellant hired a second attorney, Kenneth McCoy (“McCoy”) for the sole purpose of representing her in opposing the Motion. McCoy filed a “Response to Motion to Delete Provision in the Plan Summary” (“Response”). In her response, Appellant argued that the proposed modification was barred by res judicata and Tenth Circuit case law authority as articulated in *Andersen v. UNIPAC-NEBHELP (In re Andersen)*.⁴

On May 27, 2003, without conducting a hearing, the bankruptcy court issued its “Order Granting Motion to Delete Provision in Plan Summary” (“Order”), from which Appellant timely appeals.

³ Sanction Order at 2-3, *in* Appellant’s App. at 9-10 (emphasis added).

⁴ 179 F.3d 1253 (10th Cir. 1999).

II. Appellate Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal.⁵ An order granting a motion to delete a provision from a confirmed plan is, in essence, an order modifying a confirmed plan and is akin to a confirmation order, which is a final order.⁶ Appellant filed a timely notice of appeal. Neither party elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.⁷

III. Standard of Review

“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).”⁸ There being no factual disputes in the appeal before us, we review the bankruptcy court’s legal conclusions *de novo*.⁹

IV. Discussion

This case requires us to determine whether, as a matter of law, a bankruptcy court can order the modification or reformation of a confirmed plan on its own motion, even when the plan contains provisions that violate one or more sections of the Bankruptcy Code. The controversy arises out of this particular Bankruptcy Judge’s well-intentioned effort to regulate repeated efforts by debtors’ counsel to employ the Tenth Circuit’s holding on finality in *Andersen* as a sword to discharge student loans and other non-dischargeable debts by referring to them as dischargeable in their Chapter 13 plans. When the holders of these debts fail to challenge confirmation of the plans,

⁵ 28 U.S.C. § 158(c)(1).

⁶ *See Andersen*, 179 F.3d at 1258.

⁷ 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

⁸ *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013.

⁹ *See Woodcock v. Chemical Bank (In re Woodcock)*, 45 F.3d 363, 367 (10th Cir. 1995).

debtors argue that the finality of the confirmation order serves to discharge the debts notwithstanding pertinent provisions of §§ 523 and 1328.

Section 523(a)(8) provides that educational loans are excepted from discharge unless a debtor can establish that the debt will impose an undue hardship on the debtor and the debtor's dependants.¹⁰ Section 523(a)(8) is made applicable to Chapter 13 cases through § 1328(a)(2).¹¹

Here, Appellant sought to abate and discharge the interest that accrued on her student loan obligations during the life of her Plan. In its Order, the bankruptcy court concluded that because Provision 1 conflicts with § 523(a)(8) and existing case law, the bankruptcy court could deploy its § 105 powers to require the Appellant to purge the offending language. In so finding, the bankruptcy court calls the entry of the Confirmation Order an abuse of process that may be corrected by § 105(a). The Appellant responds that the confirmation of a Chapter 13 plan bars any collateral attack on its provisions.

As a preliminary matter, we question the bankruptcy court's subject matter jurisdiction to consider Johnson's Motion. Although styled a "Motion to Delete," the

¹⁰ Section 523(a)(8) provides as follows:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— . . . for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8).

¹¹ In pertinent part, § 1328(a)(2) provides:

As soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge or all debts provided for by the plan . . . except any debt— of the kind specified in . . . section 523(a) of this title.

11 U.S.C. § 1328(a)(2).

Motion was, in substance, a request to modify the plan. Plan modification is governed by § 1329 of the Bankruptcy Code.¹² Section 1329(a) provides for modification only upon the request of the “debtor, the trustee, or the holder of an allowed unsecured claim.”¹³ By statute, at least, it does not appear that a bankruptcy court may sua sponte modify a confirmed plan.¹⁴ Moreover, Appellant’s attorney, Johnson, was ordered to “reform” the Confirmed Plan as a sanction for his conduct in *Lemons* and seemingly without any consideration of Appellant’s position on the issue. Johnson represented the Appellant in the Chapter 13 case, but did not represent her in this matter. While we understand that Johnson filed the Motion to comply with the bankruptcy court’s Sanction Order in *Lemons*, it is clear to us that the Motion was brought in the name of the Appellant, but without her authority. We are hard put to see that the Motion was brought by an actual party in interest in the case.

Even if Johnson had standing to request the modification at the bankruptcy court’s behest, Tenth Circuit precedent as articulated in *Andersen*¹⁵ supports the Appellant’s argument that the provisions of a confirmed Chapter 13 plan cannot be collaterally attacked because they are inconsistent with or contrary to other provisions

¹² Section 1329(a) provides:

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim to—

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments; or
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329(a).

¹³ *Id.*

¹⁴ *Cf. Goodman v. Phillip R. Curtis Enters., Inc. (In re Goodman)*, 809 F.2d 228, 234 (4th Cir. 1987) (holding that a court may not sua sponte modify a confirmed Chapter 11 plan).

¹⁵ 179 F.3d 1253 (10th Cir. 1999).

of the Bankruptcy Code.

In *Andersen*, a Chapter 13 debtor filed and the bankruptcy court confirmed a plan containing a provision that discharged the balance of her student loan debt as an undue hardship.¹⁶ The student loan creditor failed to object to confirmation of the plan or to appeal the bankruptcy court's confirmation order.¹⁷ The debtor completed her plan payments and received a discharge.¹⁸ Post-discharge, the student loan lender's successor initiated collection proceedings, arguing that because the debtor had not commenced an adversary proceeding to determine the dischargeability of the student loan debt, the student loans remained excepted from the discharge.¹⁹ The bankruptcy court agreed that the "undue hardship" language in the Chapter 13 plan was not the equivalent of a binding judicial determination of hardship and that the debtor's student loans had not been discharged under the confirmed plan.²⁰ Both a panel of this Court²¹ and the Tenth Circuit disagreed.

Observing that purpose and effect of § 1327(a)²² of the Bankruptcy Code "is the same as the purpose served by the general doctrine of res judicata," the Tenth Circuit concluded that the confirmation order was res judicata as to any issues that should have

¹⁶ *Andersen*, 179 F.3d at 1254.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 1254-55.

²⁰ *Id.* at 1255.

²¹ *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 215 B.R. 792 (10th Cir. BAP 1998), *aff'd*, 179 F.3d 1253 (10th Cir. 1999).

²² Section 1327(a) provides:

The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1327(a).

or could have been raised during the confirmation process.²³ The Tenth Circuit reasoned that while the enactment of § 523(a)(8) clearly demonstrated Congress’s desire to restrict dischargeability of educational loan debt, the “strong policy favoring finality, coupled with the creditor’s complete failure to properly protect its interests during the course of the bankruptcy proceedings” meant that a creditor could not complain after confirmation in the absence of an appeal about plan provisions that were inconsistent with the Bankruptcy Code.²⁴

Andersen is squarely on point here. Although, as in *Andersen*, Provision 1 is inconsistent with the requirements of § 523(a)(8), the creditor failed to object to Provision 1, and the creditor did not appeal the confirmation order. As part of a confirmed plan to which there have been no objections and from which there has been no appeal, § 1327(a) imposes a res judicata bar that precludes a collateral attack on the plan’s content.

Resort to § 105(a) is of no avail. While this section grants bankruptcy courts the power to take “necessary or appropriate” actions “to . . . prevent an abuse of process,”²⁵ the use of these equitable powers is circumscribed by the provisions of the Bankruptcy Code. “[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.”²⁶ The confines of § 1327(a) are quite clear. The provisions of a confirmed plan bind each creditor. If § 105(a) can override § 1327(a), it could arguably override *any* other section of the Code. Congress simply did not visit this much equitable power and discretion on the bankruptcy courts.

V. Conclusion

²³ *Andersen*, 179 F.3d at 1258-59.

²⁴ *Id.* at 1260.

²⁵ 11 U.S.C. § 105(a).

²⁶ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

For the above reasons, we REVERSE the bankruptcy court's order and REMAND this matter to the bankruptcy court for proceedings consistent with this opinion.