

December 14, 2004

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE DEAN ALAN BOYER and
KARLA JOY BOYER,

Debtors.

BAP No. KS-04-015

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,

Plaintiff – Appellant,

v.

DEAN ALAN BOYER and KARLA JOY
BOYER,

Defendants – Appellees.

Bankr. No. 96-42993-13
Adv. No. 02-7141
Chapter 13

ORDER AND JUDGMENT*

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

Before CORNISH, MICHAEL, and THURMAN, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Educational Credit Management Corporation (ECMC) timely appeals a final Judgment entered by the United States Bankruptcy Court for the District of Kansas declaring, in relevant part, certain portions of the debtors' student loan debt to be discharged pursuant to a provision in their confirmed Chapter

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

13 Plan.¹ The parties have consented to this Court’s jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.² For the reasons stated below, the bankruptcy court’s Judgment is REVERSED and the matter is REMANDED.

I. Background

The debtors filed a Chapter 13 petition in 1996. They scheduled ECMC’s predecessor in interest (who will be referred to as “ECMC”) as a creditor holding a general unsecured claim for unpaid student loans.

The Chapter 13 Plan proposed by the debtors contained the following relevant provisions:

**THE PROVISIONS OF THIS PLAN ALTER CONTRACTS AND
LEGAL RELATIONSHIPS PREVIOUSLY EXISTING.
PERSONS AFFECTED ARE ADVISED TO SEEK LEGAL
ADVICE IF THEY DO NOT AGREE OR DO NOT
UNDERSTAND THE PROVISIONS OF THIS WHOLE PLAN.**

. . . .

Student Loan creditors will be paid the remaining unpaid original principal amount of any claim next from any funds paid the trustee during the plan. During the pendency of the Bankruptcy Proceeding, no interest or penalties will accrue on these debts or claims. All such debts other than the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan will be discharged upon entry of any discharge hereunder.

If the funds so paid do not repay the remaining unpaid original principal amount of any such debts, then the remaining unpaid original principal will be repaid by the debtor over a period of ten years after discharge at the then current interest rate for student loans.³

Accordingly, through this provision, the debtors proposed to discharge prepetition interest on their student loans, and any interest or penalties that accrued on that debt during their Chapter 13 case (collectively, the “Interest”).

¹ 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

² 28 U.S.C. § 158(b)-(c); Fed. R. Bankr. P. 8001(e).

³ Chapter 13 Plan at 2, Appellant’s Appendix at 54.

Despite the debtors' proposal to discharge the Interest through the confirmation of their Plan, not by a judgment pursuant to 11 U.S.C. § 523(a)(8),⁴ ECMC did not object to confirmation of this Plan. In May, 1997, the bankruptcy court entered an Order confirming the debtors' Plan (Confirmation Order). ECMC did not appeal the Confirmation Order.

In July, 1997, ECMC filed a proof claim in the debtors' case, asserting a general unsecured claim in the total amount of \$33,724.90. Of this amount, \$26,694.09 was claimed as principal (Principal Debt). The debtors objected to ECMC's proof of claim, arguing that it was not supported by proper documentation. ECMC amended its proof of claim, reducing its claim for Interest, but it never filed a pleading responding to the debtors' claim objection. Thus, being unopposed, the bankruptcy court entered an Order sustaining the debtors' claim objection (Claim Order). Although the claim objection only requested that ECMC's proof of claim be disallowed, the Claim Order prepared by the debtors' counsel states that the entire student loan debt reflected in the proof of claim was discharged. This Claim Order, therefore, is broader than the Confirmation Order in that it purports to discharge both the student loan Principal Debt and Interest.

The debtors completed all payments under their confirmed Plan. Because ECMC's claim was disallowed by the Claim Order, it received no payments through the debtors' confirmed Plan.

In May, 2001, the bankruptcy court entered a "Discharge Order," granting the debtors a discharge pursuant to § 1328(a). The Discharge Order discharged

⁴ All future statutory references in the text are to title 11 of the United States Code. Section 523(a)(8) states that student loan debt is excepted from discharge, unless doing so "will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8); *see* Fed. R. Bankr. P. 4007(a)-(b) & 7001(6) (adversary proceeding necessary to determine the dischargeability of a debt, and the debtor may file a complaint to commence such a proceeding at any time).

the debtors' student loan debt in its entirety.⁵ This form Order is not in accord with the version of § 523(a)(8) applicable in the debtors' case requiring their entire student loan debt to be excepted from discharge, and it also contradicts the Confirmation Order, which only discharged the debtors' student loan Interest.

Subsequently, ECMC commenced an adversary proceeding against the debtors, seeking a determination as to the dischargeability of the debtors' student loan debt. It alleged that the debt was not discharged by the Claim Order, and it requested that the Claim Order be amended pursuant to Federal Rule of Civil Procedure 60(b)(4) or (b)(6).⁶ The debtors, in turn, asserted that the subsequent Discharge Order discharged the student loans in their entirety. ECMC then filed a motion to amend the Claim Order and/or the Discharge Order and a Motion for Summary Judgment. In these papers, it argued that the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. ECMC also alleged that the Interest was not discharged by the confirmed Plan because the debtors did not obtain a judgment under § 523(a)(8). The debtors opposed ECMC's Motions.

⁵ The Discharge Order states:

1. Pursuant to 11 U.S.C. Section 1328(a) the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. Section 502, except any debt:

. . . .

- (c) for a student loan . . . as specified in 11 U.S.C. Section 523(a)(8) in any case in which discharge is granted prior to October 1, 1996[.]

Discharge Order at 1, *quoted in Educ. Credit Mgmt. Corp. v. Boyer (In re Boyer)*, 305 B.R. 42, 55 (Bankr. D. Kan. 2004). As discussed by the bankruptcy court, this language arose from a prior version of § 523(a)(8) and was included in the form order generated by the clerk of court by mistake. *Id.*

⁶ Federal Rule of Civil Procedure 60(b) is made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9024.

The bankruptcy court entered Judgment in favor of ECMC in part, and in favor of the debtors in part. It held that the student loan Principal Debt, plus post-discharge interest, was not discharged, but that the Interest was discharged. The bankruptcy court's Judgment is supported by separate findings of fact and conclusions of law, set forth in a Memorandum and Order.⁷

In its Memorandum and Order, the bankruptcy court held that the Principal Debt was excepted from discharge under § 523(a)(8) because the debtors had not obtained a "hardship discharge" under that section, and the discharge provision in the debtors' confirmed Plan did not apply to the Principal Debt. It refused to enforce the Claims Order and the Discharge Order to the extent that they stated that the Principal Debt was discharged. The Interest, however, was excepted from discharge pursuant to the terms of the debtors' confirmed Plan, even though they did not obtain a judgment against ECMC pursuant to § 523(a)(8). The bankruptcy court held that under *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,⁸ ECMC could not collaterally attack the final Confirmation Order that discharged the Interest when the debtors completed their Plan payments. It did not address the discharge of the Interest pursuant to the Claim Order and the Discharge Order because the Confirmation Order controlled, and its discharge of the Interest did not conflict with those Orders, both of which discharged the student loan debt.

⁷ *Boyer*, 305 B.R. at 42. This Memorandum and Order contains findings of fact and conclusions of law related to the Judgment entered in the debtors' case, as well the Judgments entered in three other Chapter 13 cases involving similar facts and issues. *In re Seiwert*, Bankr. No. 96-43032-13 (Bankr. D. Kan.); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, Bankr. No. 98-41327-13, Adv. No. 03-7025 (Bankr. D. Kan.); *In re Mersmann*, Bankr. No. 98-41940-13 (Bankr. D. Kan.) [hereinafter referred to collectively as the "Related Debtor Cases"].

⁸ 179 F.3d 1253 (10th Cir. 1999).

ECMC appealed the bankruptcy court's Judgment.⁹ The debtors did not appeal the portions of the bankruptcy court's Judgment adverse to them.¹⁰ The only issue before this Court is whether the bankruptcy court erred in discharging the student loan Interest.

II. Discussion

For the same reasons stated in *Educational Credit Management Corp. v. Nelson (In re Nelson)*,¹¹ the portion of the bankruptcy court's Judgment declaring the student loan Interest to be discharged under the debtors' confirmed Plan must be reversed in light of *Poland v. Educational Credit Management Corp. (In re Poland)*.¹² The debtors' confirmed Plan contains no "finding of undue hardship" and, therefore, it does not discharge the student loan Interest. The debtors can only obtain a discharge of their student loan debt by commencing an adversary proceeding against ECMC under § 523(a)(8), and proving that payment of that debt will impose an "undue hardship" on them

⁹ ECMC also appealed the Judgment entered by the bankruptcy court in each of the Related Debtor Cases. The bankruptcy court's Judgment in two of the Related Debtor Cases is reversed for the same reasons stated in this Order and Judgment. *In re Seiwert*, BAP No. KS-04-016 (10th Cir. BAP filed Dec. 14, 2004); *Educ. Credit Mgmt. Corp. v. Nelson (In re Nelson)*, ___ B.R. ___, BAP No. KS-04-017 (10th Cir. BAP filed Dec. 14, 2004). In the third Related Debtor Case, *In re Mersmann*, we have entered an Opinion affirming the bankruptcy court's Judgment. ___ B.R. ___, BAP No. KS-018 (10th Cir. BAP filed Dec. 14, 2004). Unlike this case or the other two Related Debtor Cases, the discharge clause in the confirmed plan in *Mersmann* contained a "finding of undue hardship" and, therefore, under *Andersen*, 179 F.3d at 1256, that finding was binding on ECMC. See *Poland v. Educ. Credit Mgmt. Corp. (In re Poland)*, 382 F.3d 1185, 1189 (10th Cir. 2004) & discussion *infra*.

¹⁰ As such we need not, and cannot, address the propriety of the bankruptcy court's decision refusing to enforce the provisions of the Claim Order and the Discharge Order as they relate to the Principal Debt.

¹¹ ___ B.R. ___, BAP No. KS-04-017, Slip Op. at 5-8; accord *Seiwert*, BAP No. KS-04-016, Slip. Op. at 6.

¹² 382 F.3d 1185 (10th Cir. 2004).

and their dependents.¹³

While the student loan Interest was not discharged by the debtors' confirmed Plan as a matter of law under *Poland*, we note that the Claim Order and the Discharge Order state that the debtors' entire student loan debt, including the Interest, is discharged. Although ECMC challenged these discharge provisions below, requesting in its Complaint and in subsequent motions that both Orders be altered or amended to except the Interest from discharge, the bankruptcy court did not rule on ECMC's request for judgment or motions because it had concluded that the Interest was discharged pursuant to the confirmed Plan. We therefore remand this matter to the bankruptcy court to address ECMC's challenge of the discharge of Interest in the Claim Order and the Discharge Order.

III. Conclusion

The bankruptcy court's Judgment is REVERSED, and the case is REMANDED to the bankruptcy court for further proceedings consistent with this Order and Judgment.

¹³ 11 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 4007(a)-(b) & 7001(6); *Poland*, 382 F.3d at 1189 (adversary proceeding required, and debtor has burden to prove "undue hardship"); *Andersen*, 179 F.3d at 1256 (same); *Mersmann*, ___ B.R. ___, BAP No. KS-04-018, Slip. Op. at 5-6 (same); see generally *Educ. Credit Mgmt. Corp. v. Polleys (In re Polleys)*, 356 F.3d 1302 (10th Cir. 2004) (discussing elements of "undue hardship"); *In re Woodcock*, 45 F.3d 363 (10th Cir. 1995) (debtor has burden to prove "undue hardship"); *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 308 B.R. 495 (10th Cir. BAP 2004) (discussing elements of "undue hardship," and debtor has burden of showing by preponderance of the evidence).