

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
JON CHRISTOPHER DELGADO))	Case No. 99-13234
LISA JOANN DELGADO,)	Chapter 13
)	
Debtors.)	
_____)	

MEMORANDUM OF DECISION

Educational Credit Management Corporation (ECMC) objects to confirmation of debtors' Chapter 13 plan. ECMC appears by N. Larry Bork of Topeka. Debtors Jon and Lisa Delgado appear by Donald B. Clark. In their plan, debtors seek to discharge accrued post-petition interest and collection charges on Jon's student loan. Debtors make no assertion that they are unable to repay the loan without suffering undue hardship. In its objection, ECMC asserts that debtors' educational loan including post-petition interest and any other charges is excepted from discharge by 11 U.S.C. §§ 523 (a) (8) and 1328(a)(2) and that debtors should not "bootstrap" a discharge of this portion of its claim into their plan.

FACTS

On January 27, 1986, debtor Jon C. Delgado executed a Guaranteed Student Loan Promissory Note to First National Bank, Coffeyville, Kansas, in the amount of \$2,500.00 with interest at a rate of 8% per annum. The loan was disbursed to debtor on or about February 28, 1986. The terms of the Guaranteed Student Loan provided that repayment of the loan would begin six months after debtor left school or ceased to carry at least one-half the normal academic work

load. On January 5, 1987, debtor defaulted on the loan. The bank filed a claim with the Higher Education Assistance Foundation (HEAF), the guarantor, and received payment. The loan was assigned to HEAF. On June 9, 1993, HEAF was reimbursed by the Department of Education (DOE) in the amount of \$3,981.59, and, pursuant to DOE's reinsurance agreement, HEAF assigned the loan to DOE. On August 30, 1999, Debtors filed their Chapter 13 case. DOE filed the pending objection to confirmation of the plan. On November 16, 1999, the Court¹ confirmed the chapter 13 plan pending resolution of DOE's objection. Thereafter, on December 19, 1999, DOE assigned the loan (and its claim) to ECMC. ECMC asserts a claim against the debtors in the amount of \$5,644.86, representing the unpaid principal balance plus accrued interest thru August 10, 1999 and collection costs. Debtors' plan as amended provides payment to ECMC in the amount of \$4,781.44, including principal in the amount of \$2,692.30 and unpaid interest accrued through the date of their bankruptcy filing in the amount of \$2,089.14. Debtors' plan also provides that the allowed claim of ECMC shall be paid in full in the Chapter 13 plan.

ANALYSIS

Resolving ECMC's confirmation objection requires us to determine whether post-petition interest and collection charges accruing on debtors' student loan during the pendency of their Chapter 13 plan is dischargeable by making such a provision in their plan. Debtors stipulate that the student loan itself is excepted from discharge by 11 U.S.C. § 523(a)(8). Section 523(a)(8) excepts from discharge any debt "...for (a) loan made, insured or guaranteed by a governmental unit...unless excepting such debt from discharge...will impose undue hardship on the debtor..." This nondischargeability section applies in chapter 13. The chapter 13 super discharge does not

¹The Honorable John K. Pearson, B.J., presiding.

include debts “of the kind specified in paragraph (5), (8), or (9) of § 523(a) of this title.”
§1328(a)(2).

The Code is clear that *debts* for the repayment of educational loans are not dischargeable, however it contains no direct reference to whether post-petition interest on a nondischargeable student loan is discharged. The leading case on the dischargeability of post-petition interest is Bruning v. United States, 376 U.S. 358, 84 S. Ct. 906, 11 L.Ed.2d 772 (1964), which was decided under the Bankruptcy Act and dealt with the dischargeability of post-petition interest on tax debts. In Bruning, the Supreme Court held that although post-petition interest on a nondischargeable tax debt could not be paid by the bankruptcy estate, it accrued during the pendency of the case and became a personal liability of the debtor when the bankruptcy was completed. Id. at 361. The Supreme Court reasoned that because Congress excepted the tax debt from discharge, it “clearly intended that personal liability for unpaid tax debts survive bankruptcy.” Id.

Debtors contend that Bruning should not apply in this case because (1) Bruning was decided under the Bankruptcy Act; and (2) in Bruning, the tax debt was not paid in full while in this case, debtors’ plan provides for the full payment of the allowed claim out of the estate. Debtors’ argument concerning the continued vitality of the Bruning rule is readily answered by various Circuit Courts, including the Tenth Circuit, which have declared that Bruning remains good law after the enactment of the Bankruptcy Code. See Fullmer v. United States (In re Fullmer), 962 F.2d 1463, 1468 (10th Cir. 1992); Leeper v. Pennsylvania Higher Educ. Assistance Agency (In re Leeper), 49 F.3d 98, 101-02 (3rd Cir. 1995); Hanna v. United States (In re Hanna), 872 F.2d 829, 831 (8th Cir. 1989); Bradley v. United States, 936 F.2d 707, 709-10 n. 3 (2nd Cir. 1991); and Burns v. United States (In re Burns), 887 F.2d 1541, 1543 (11th Cir. 1989). This bankruptcy court is bound by (and agrees with) our Circuit’s view and has previously so held. See

In re Wheeler, No. 99-5299, slip op. at 7 (Bankr. D. Kan. July 10, 2000).

In our previous decision, we noted that other courts have overwhelmingly extended the Bruning principle to apply to post-petition interest on nondischargeable student loans. See Wheeler, slip op. at 7; See also Bell v. Educational Credit Management Corp. (In re Bell), 236 B.R. 426, 430 (N.D. Ala. 1999); Leeper, 49 F.3d at 105; Great Lakes Higher Education Corp v. Pardee (In re Pardee), 218 B.R. 916, 921 (9th Cir. B.A.P. 1998); Jordan v. Colorado Student Loan Program (In re Jordan), 146 B.R. 31, 32-33 (D. Colo. 1992); Ridder v. Great Lakes Higher Education Corp. (In re Ridder), 171 B.R. 345, 347-48 (Bankr. W.D. Wis. 1994); and In re Shelbayah, 165 B.R. 332, 337 (Bankr. N.D.Ga. 1994).

Debtors also argue that if Bruning remains good law, it should be limited to cases where a claim for taxes is not fully paid out of the bankruptcy estate. Debtor cites In re Wasson, 152 B.R. 639 (Bankr. D.N.M. 1993)(holding post-petition interest on a student loan not allowed when underlying claim is paid in full from the estate), and In re Christian, 25 B.R. 438, 438-39 (Bankr. D.N.M. 1982)(holding that Bruning rule did not apply to a tax debt which was fully paid out of the estate), as support for this proposition. The rationale and result in Wasson have been heavily criticized by other courts having occasion to visit this issue. Courts which have examined the Wasson analysis conclude that the court “confused the concept of claim disallowance under § 502(b)(2) in which a claim for unmatured interest cannot be paid from the bankruptcy estate, with the concept of nondischargeability under §§ 523(a)(8) and 1328(a)(2).” Pardee, 218 B.R. at 921. The fact that § 502(b)(2) bars recovery of post-petition interest from the bankruptcy estate does not “proscribe recovery from the debtor personally for nondischargeable debts that are not paid from the bankruptcy estate.” Id.

According to the Pardee court, Wasson “overlooked the distinction between ‘claims’ and

‘allowed claims.’” Section 502 speaks to the allowance of *claims* while § 523 excepts *debts* from discharge. *Debt* is defined as a liability on a claim, §101(12), and *claim* is defined as a right to payment, whether matured or unmatured. §101(12). Notwithstanding the provisions of the debtors’ plan, §1328(a)(2) clearly excepts from discharge those claims which are excepted by §523(a)(8). The personal liability of a debtor for post-petition interest accruing on a pre-petition nondischargeable debt for a student loan is therefore not discharged in debtors’ chapter 13 plan.

While ECMC’s *allowed claim* may well be paid in full under the plan, ECMC’s *claim* is not. “[I]nterest is considered to be the cost of the use of the amounts owing a creditor and an incentive to prompt repayment and, thus, an integral part of a continuing debt.” Bruning, 376 U.S. at 360. See also Pardee, 218 B.R. at 922. Because debtors’ plan does not and cannot provide for the payment of post-petition interest, ECMC’s claim will not be paid in full under the plan.

Debtors’ reliance on the holding in Bossert v. United States (In re Bossert), 201 B.R. 553 (Bankr. E.D. Wash. 1996) is misplaced. In Bossert, the court held that the IRS could not collect post-petition interest from a chapter 12 debtor who paid in full his tax debt through his chapter 12 plan. In barring the IRS from further collection, the Court said, “Section 1222(a)(2) prescribes the terms of ‘full payment’ of this priority/nondischargeable tax debt and those terms are without interest.” Id. at 558. Chapter 12 requires as a prerequisite to confirmation that priority tax claims be paid in the plan. §1222(a)(2). Chapter 13’s requirement is identical. §1322(a)(2). Student loans do not occupy the same priority status in either chapter 12 or chapter 13. While nondischargeable, student loan debts are not required to be paid in full under the plan as a condition of confirmation. Thus, whatever student loan debt not fully paid for under the chapter 13 survives the discharge and the debtor remains personally liable for it. §1328(a)(2). Bossert simply does not apply here.

The Court therefore sustains ECMC's objection to confirmation of the debtors' plan. Debtors are granted 10 days from the date of the entry of this Memorandum and accompanying Judgment on Decision in which to file an amended plan which omits the offending provision concerning post-petition interest, to convert this case to chapter 7, or to dismiss.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. The Judgment on Decision based on this ruling will be entered on a separate document as required by Fed. R. Bank. P. 9021 and Fed. R. Civ. P. 58.

Dated at Wichita, Kansas this 14th day of July, 2000.

ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **MEMORANDUM OF DECISION** was deposited in the United States mail, postage prepaid on this 14th day of July, 2000, to the following:

Jon & Lisa Delgado
1908 Pike Road

Winfield, KS 67156

Donald B. Clark
1518 N. Broadway
Wichita, KS 67214

Laurie B. Williams
328 N. Main, Ste. 200
Wichita, KS 67202

Robin B. Moore
301 N. Main, Ste. 1200
Wichita, KS 67202

N. Larry Bork
515 S. Kansas Ave.
Topeka, SK 66603

Janet Swonger
Judicial Assistant