



SO ORDERED.

SIGNED this 16 day of February, 2005.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

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

IN RE:

**DEAN ALAN BOYER
KARLA JOY BOYER**

**Case No. 96-42993
Chapter 13**

Debtors.

**EDUCATIONAL CREDIT
MANAGEMENT CORPORATION,**

Plaintiff,

vs.

Adversary No. 02-7141

DEAN ALAN BOYER,

Defendant.

**MEMORANDUM AND ORDER
AFTER REMAND**

This adversary proceeding is now before the Court following remand from the United States Bankruptcy Appellate Panel of the Tenth Circuit (BAP). Educational Credit Management Corporation

(ECMC) filed a Complaint to determine whether its student loan had been discharged as a result of the Confirmation Order,¹ Claim Order,² or Discharge Order.³ In the Judgment on Decision filed February 3, 2004, for the reasons stated in a simultaneously filed Memorandum and Order,⁴ this Court granted judgment in favor of Debtors, Dean Alan Boyer and Karla Joy Boyer, in part, and in favor of ECMC, in part.

Relying on *Andersen v. UNIPAC-NEBHELP (In re Andersen)*,⁵ this Court held that pursuant to the terms of the confirmed plan, Interest was discharged when the plan was completed and the discharge was granted. Similarly, this Court found that the amount of principal remaining unpaid upon completion of Debtors' chapter 13 plan was not discharged by the terms of the Confirmation Order. This Court's order thus prohibited ECMC from taking or continuing any action to collect or recover any amounts other than

¹This reference is to the original order confirming the Chapter 13 plan. Doc. No. 15. The plan that was the subject of this order provided that no interest or penalties would accrue on the student loan during the pendency of the Chapter 13 plan, and that upon completion of the plan, all pre-petition interest, and any post-petition interest and penalties that accrued during the plan, would be discharged "upon entry of any discharge hereunder." BAP referred to these discharged amounts as "Interest," and this Court will also use that term.

²This reference is to the Order Granting Objection to Claims. Doc. No. 62.

³This reference is to the form discharge order issued by the Court. Doc. No. 73.

⁴*Educational Credit Management Corp. v. Boyer (In re Boyer)*, 305 B.R. 42 (Bankr. D. Kan. 2004).

⁵179 F.3d 1253 (10th Cir. 1999).

the remaining unpaid original principal amount of the loans remaining unpaid upon completion of the plan, plus post-discharge interest, pursuant to 11 U.S.C. § 524.⁶

The BAP reversed, relying on the Tenth Circuit's new *Poland v. Educational Credit Management Corp. (In re Poland)*⁷ decision. This decision was entered after this Court's opinion was issued, and was decided by a different three-judge panel than had decided *Andersen*. *Poland* held that the confirmed plan could not properly act to discharge Interest because the plan contained no express finding of undue hardship. The BAP noted that under the facts of this case, however, its reversal based on the Confirmation Order did not end the inquiry, because the discharge issue was further complicated by language contained in two orders issued by the Bankruptcy Court subsequent to the Confirmation Order. The BAP thus held:

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.

⁶All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

⁷382 F.3d 1185 (10th Cir. 2004) (holding, among other things, that *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253 (10th Cir.1999), was wrongly decided and should be reconsidered).

As a result of that mandate, this Court issued a Post-BAP Decision Scheduling Order granting the parties the opportunity to file additional briefs on the remanded issues. Those briefs have been filed, and the Court is now ready to rule.

I. Standard of Review

This Court's original Memorandum and Order analyzed the extent of the discharge of Debtors' student loan obligations by applying the restricted standard of review set forth in Rule 60 of the Federal Rules of Civil Procedure⁸ and by considering the need for finality of confirmation orders.⁹ This order was entered both in Debtors' main case, in which ECMC had filed a Rule 60 motion,¹⁰ and in the adversary proceeding, wherein ECMC had also filed its Rule 60(b) motion.¹¹ ECMC filed its Notice of Appeal only in the adversary proceeding,¹² not in the debtors' main case.¹³

The BAP Order does not address the applicable scope of review. Instead, it identified the issue before the Court as "whether the bankruptcy court erred in discharging the student loan Interest," and

⁸*In re Boyer*, 305 B.R. at 47 (noting that Fed. R. Civ. P. 60 is made applicable in bankruptcy cases by Fed R. Bankr. P. 9024).

⁹*Id.* at 48, 51.

¹⁰Doc. No. 83.

¹¹Doc. No. 9.

¹²Doc. No. 18.

¹³ ECMC's issue on appeal was "Did the Bankruptcy court err in holding that the Confirmation Order is *res judicata* as to the dischargeability of Debtors' student loans under 11 U.S.C. 523(a)(8), where the Student Loan Creditor was denied Due Process as a result of the dischargeability determination." The appeal was filed solely in the Adversary Proceeding, not in the main case. It thus appears ECMC's Rule 60 motion was not properly before the BAP.

proceeded to apply the rule of *Poland*. This Court will follow the BAP's lead and base its decision on remand upon the merits of the cases addressing discharge of the student loan Interest, without regard to the procedural posture of this case.

II. Analysis

At least one panel of the Tenth Circuit Court of Appeals, in *In re Poland*, as well as the Tenth Circuit BAP, have now made it clear that unless a plan contains specific language finding that the failure to discharge a student loan will constitute an undue hardship on the debtor or his dependents, pursuant to § 523(a)(8), student loans cannot be discharged, notwithstanding the principles of finality revered by another panel of the Tenth Circuit in *In re Andersen*. On remand, this Court now finds that neither the Claim Order nor the Discharge Order change that result, and they should not be construed to result in the discharge of the subject student loans.

A. Claim Order

Debtors filed their objection to ECMC's first proof of claim in February 1998. The sole basis for their objection was that ECMC had failed to include supporting documentation with the claim. The only relief prayed for was that the "claim be denied." After that objection, but before any order was entered on the objection to the original claim, ECMC filed an amended proof of claim. Debtors never objected to that claim.

Over two years after Debtors filed their objection to ECMC's original claim, Debtors' counsel submitted an Order on Debtor's (sic) Objection to Claim (Claim Order). The problems with this Order were numerous. First, the title referenced an objection to a single claim, but the relief sought, and received, related to both ECMC claims. Second, paragraph 1 notes Debtors filed their objection to claims on

October 12, 1998. A review of the docket sheet will show the only objection to either ECMC claim was filed in February, 1998. Third, the Order makes the quantum leap that a sustained objection to a claim—thus resulting in no payment by the Trustee during the term of the Chapter 13 proceeding—is equivalent to an outright discharge of the underlying debt. Fourth, the Order is internally inconsistent. In paragraph 6, it notes that only the “original principle (sic) amount” will remain payable after completion of the plan. The next line, in paragraph 7, then states “the claims of ECMC, however they might have been listed, are denied, and debtor is granted a discharge as to these claims filed by ECMC.”

In this Court’s original opinion, it declined to “reward debtor for his counsel drafting an order that grants relief in excess not only of what his own confirmed plan provided, but also in excess of the relief prayed for in the actual objection to the creditor’s first claim.” The Court noted that because this Claim Order directly contradicted Debtors’ own plan, it would not be enforced. The BAP, along with the *In re Poland* panel of the Tenth Circuit, has now provided an additional basis for refusing to enforce the Claim Order. The Claim Order also fails to include the required finding that failure to discharge the student loan, and any interest attendant thereto, would constitute an undue hardship on Debtor or his dependents. This Court finds that if a plan cannot discharge a student loan for failure to include the required magic language of undue hardship, then neither can a subsequent Claim Order.

In addition, other courts have noted that claim allowance and debt liability are different concepts, such that an order disallowing a claim does not necessarily discharge the underlying debt. In *Bell v. Educational Credit Management Corp. (In re Bell)*,¹⁴ a Chapter 13 debtor had objected to the claim

¹⁴236 B.R. 426 (D. N.D. Ala. 1999).

of ECMC's predecessor. The creditor then filed an amended proof of claim. The bankruptcy court reduced the amount of the claim to \$2000. After debtor completed plan payments in that amount, a discharge order was entered. ECMC nevertheless attempted to collect the remaining balance on its claim by offsetting debtor's subsequent year tax refund. The debtor filed an adversary proceeding alleging that ECMC had violated the discharge order.

The bankruptcy court ruled in the debtor's favor, holding that ECMC was entitled to recover only \$2000 of its claim and the interest that had accrued on that amount during the pendency of the Chapter 13 case. The district court reversed. Noting that the burden of filing a dischargeability proceeding is squarely on the debtor, and that she had not chosen to litigate the issue of whether the non-discharge of the student loan would constitute an undue hardship on her or her dependents, it held, "[t]o allow a debtor to override the provisions of the Bankruptcy Code and discharge student loans through a claim objection would abrogate clear intent of the bankruptcy code to make student loans nondischargeable."¹⁵

The court further explained that principles of res judicata and collateral estoppel did not prevent ECMC from collecting the remaining student loan debt, because

The issue before the bankruptcy court at the time of the claim objection (the amount of the claim to be administered through the Chapter 13 plan) was not the same issue before the bankruptcy court at the hearing on Ms. Bell's complaint to recover money, i.e., the effect of the general discharge on ECMC's ability to collect the outstanding balance due from Ms. Bell on her student loan debt.¹⁶

¹⁵*Id.* at 430.

¹⁶*Id.* at 429.

The court noted that dischargeability was never litigated in the prior action, and further explained the fundamental difference between the “debt” and the “claim.” In light of the analysis of the Tenth Circuit contained in *Poland*, this Court finds the reasoning persuasive.

Similarly, in *Cruz v. Educational Credit Management Corp. (In re Cruz)*,¹⁷ the Chapter 13 debtors objected to a proof of claim filed by ECMC, and ECMC failed to respond. As a result, the court entered an order disallowing the claim. The order stated that the claim was disallowed, and that the “claim has been paid in full.” After completing their Chapter 13 plan payments, the court entered a general discharge order, which excepted any debt for a student loan as specified in § 523(a)(8). When ECMC attempted to collect payment of the student loan by intercepting the debtors’ federal income tax refund, the debtors moved to reopen the Chapter 13 case to pursue a contempt action. Debtors argued that collateral estoppel barred ECMC’s actions, because the claim order specifically held “the claim has been paid in full.”

The court held that its claim order did not serve to discharge ECMC’s debt. The court reasoned that “[e]ducational loans are presumptively nondischargeable and Debtors will need to file an adversary proceeding to determine the dischargeability of their debt to ECMC.”¹⁸ The court also rejected the assertion that the claim order collaterally estopped the post discharge collection of the student loan because the issue in the claim proceeding did not include dischargeability, the issue of dischargeability was not actually litigated, there was no determination on the merits, and the burden of proof in claim litigation is not identical to that in dischargeability litigation.¹⁹ For the same reasons, this Court similarly finds that the

¹⁷ 277 B.R. 793 (Bankr. M.D. Ga. 2000).

¹⁸ *Id.* at 795.

¹⁹ *Id.* at 795-96.

improperly worded Claim Order in this case does not serve to collaterally estop ECMC from contesting the dischargeability of Interest herein.

B. Discharge Order

The Discharge Order entered by this court used the following language:

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[.]

Because the Boyer's discharge was entered in May, 2001, the reference to the date of October 1, 1996 had the effect of discharging the entire student loan.

This Discharge Order is identical to the one used by the bankruptcy court in *Poland*, which the Tenth Circuit Court of Appeals has now held cannot "be the basis for discharging the student loan debt" because "the plan language in this case does not establish discharge."²⁰ Following the Tenth Circuit's *Poland* decision, this Court finds that the Discharge Order herein cannot supersede the Confirmation Order, as modified by the BAP. In addition, as this Court noted in its original Memorandum and Order, discharge orders are "automatically generated by the Clerk of the Bankruptcy Court, without the Court, the trustee, the debtor's attorney, or any other party in interest attempting to tailor it to the actual facts of the case or the terms of the consummated plan."²¹ The discharge purportedly granted by the Discharge

²⁰*In re Poland*, 382 F.3d at 1189.

²¹*In re Boyer*, 305 B.R. at 54 (discussing orders entered in the three companion cases).

Order was never actually litigated, as it must be pursuant to the terms of § 523(a)(8), and ECMC is thus not bound by the form language used in that order. Further, as previously noted, the offending language, “prior to October 1, 1996,” was “archaic” language arising from a prior version of §523(a)(8), likely included by mistake and it should have been deleted from the form.²²

Finally, the circumstances under which the Claim Order and the Discharge Order were entered in this case support a holding that they should not control over the Confirmation Order, as revised by the BAP. The procedures attendant to entry of both the Claim Order and Discharge Order did not provide the extent of notice and opportunity to object required to be given under § 523(a)(8) if the ECMC debt was to be discharged.

III. CONCLUSION

Because the issue of Debtors’ undue hardship was not specifically litigated at confirmation, at the time of the claims objection process, or before the discharge order was entered, neither the Claim Order nor the Discharge Order can serve to discharge any portion of Debtors’ student loan obligations. The Court thus sustains ECMC’s challenge to the Claim Order and the Discharge Order.

²²*Id.* at 55.

IT IS, THEREFORE, ORDERED that this Court's June 14, 2000 Claim Order²³ and its May 17, 2001 Discharge Order²⁴ are modified to hold they did not effectuate a discharge of Debtors' student loan debt to ECMC. An order in accordance with this Memorandum and Order will be separately entered.

IT IS SO ORDERED.

#

²³Doc. No. 62.

²⁴Doc. No. 73.