

#2573

signed 5-16-02

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

**In re:**

**STACY LYNN SHAW,  
DEBTOR.**

**CASE NO. 01-41230-13  
CHAPTER 13**

**In re:**

**MICHELLE MARIE BOLZE-SANN,  
CHARLES LEE SANN,  
DEBTORS.**

**CASE NO. 01-40827-13  
CHAPTER 13**

**ORDER DECLINING TO DECLARE THAT SANCTIONS  
WILL ALWAYS BE IMPOSED IN THE FUTURE  
AGAINST ANYONE WHO FILES A PLAN PROVIDING FOR  
DISCHARGE OF POSTPETITION INTEREST ON STUDENT LOANS**

These matters are before the Court for resolution of an objection to a provision included in the chapter 13 plan filed in each case. The debtors appear by counsel Gary E. Hinck and Fred W. Schwinn. The objecting creditor, Educational Credit Management Corporation (“ECMC”), appears by counsel N. Larry Bork. The Court has reviewed the relevant pleadings and is now ready to rule.

In each case, the plan creates a “Special Class II” and provides:

Special Class II, consisting of government guaranteed education loans, is to be paid in full, without interest. Any balance remaining on this debt consisting of post-petition interest shall be discharged upon completion of this plan. Confirmation of this plan shall constitute a finding to that effect and said post-petition interest is dischargeable.

Pursuant to 11 U.S.C.A. §1328(a)(2) and §523(a)(8), student loan debts are not dischargeable in chapter 13 unless excepting them from discharge “will impose an undue hardship on the debtor and the debtor’s dependents.” In a case decided under the old Bankruptcy Act, the Supreme Court ruled in *Bruning v. United States*, 376 U.S. 358 (1964), that postpetition interest on a nondischargeable tax

debt, though not allowable against a bankruptcy estate, was an integral part of the debt and remained enforceable against the debtor personally after discharge. Typically relying on *Bruning*, courts have generally agreed that postpetition interest on nondischargeable student loan debts is also nondischargeable. See 4 Keith M. Lundin, *Chapter 13 Bankruptcy* §346.1 at 346-8 to 346-17. Because the debtors' plans do not allege that excepting this postpetition interest from discharge would impose an undue hardship on them or their dependents, their "Special Class II" provision seeks relief that is not made available to them by the Bankruptcy Code, but can only be obtained with the consent of their student loan creditors. Thus, plans with this provision are not confirmable because they do not comply with the Bankruptcy Code, in violation of 11 U.S.C.A. §1325(a)(1). ECMC asks the Court to declare that, in the future, the inclusion of such a provision in any chapter 13 plan will result in sanctions.

The Court recently considered a similar request by ECMC in a related, but distinguishable, context. See *In re Gardner*, Case No. 00-42099-13, Order Concerning Request for Sanctions for Including in a Plan a Provision for an Undue Hardship Discharge of Student Loans (Bankr.D.Kan. Feb. 22, 2001) (order applicable to three cases), *aff'd sub nom. In re Wright*, Case No. 01-4035 (Bankr. Case. No. 00-42043-13) Memorandum and Order (D.Kan. Apr. 29, 2002) (Rogers, J.). In those cases, the debtors had included in their plans provisions declaring that repayment of any balances remaining on their student loan debts after completion of their plans would impose an undue hardship on the debtors and their dependents, so the balances would be discharged. The distinction between *Gardner* and these cases is that the discharge of student loan debts because of undue hardship is available under the Bankruptcy Code, while the discharge of postpetition interest on student loan debts

without undue hardship is not. Nevertheless, the *Gardner* decision informs the Court's thinking in these cases.

In *Gardner*, the Court concluded that an undue hardship discharge provision could be included in a chapter 13 plan and a creditor's opposition to the undue hardship allegation could be resolved through the plan confirmation process because that process was sufficiently similar to the adversary proceeding process that student loan creditors received all the procedural protections they would have in an adversary proceeding. However, the Court also indicated that an undue hardship discharge provision could not properly be included in a plan when no undue hardship even arguably existed, in hopes of slipping it by inattentive or unsuspecting student loan creditors. Such action would likely violate Federal Rule of Bankruptcy Procedure 9011(b)(3) and subject the person taking the action to sanctions under subdivision (c) of that Rule. Similarly, including a provision for the discharge of postpetition interest on student loans without alleging undue hardship would appear to raise the question whether the proponent had falsely certified that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Bankr. P. 9011(b)(2).

The debtors' counsel suggest the plan provision is merely a proposal to the student loan creditors that they are free to accept or reject. The problem with this view in this context is that, if the plan is confirmed without objection, the creditors' silence will have been treated as their consent to the otherwise unlawful provision, even though §1325(a)(1) indicates the Court should not confirm the plan. If accepted, the suggestion would permit debtors to propose plans with any impermissible provisions their counsel can think of, and have the plans confirmed unless affected creditors object. For example,

debtors could propose to expand the chapter 13 discharge to cover all the debts that are made nondischargeable by §1328(a), and have their plans confirmed unless creditors object. The Court believes debtors cannot rely on creditor silence to take away the creditors' unqualified rights under chapter 13, but instead must obtain actual affirmative assent to such provisions.

While the Court can agree with ECMC that the plan provision used in these cases is improper, the Court is not willing to declare now that all counsel and debtors who might include a similar provision in a future plan will be sanctioned. The Court cannot prejudge the motives or knowledge of such counsel and debtors, or foresee all the circumstances that might surround their decision to include the provision. It is possible that some student loan creditor will affirmatively agree to such treatment. Perhaps someone will devise an argument in support of the provision that satisfies the test of Fed. R. Bankr. P. 9011(b)(2). The Court is willing to warn the attorneys who filed the plans in these cases that they may be sanctioned if they include such a provision in a future chapter 13 plan unless there is some relevant change in the law, or they are able to devise a nonfrivolous new argument justifying it. But the Court will not establish a blanket sanction rule applicable to all future cases.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this \_\_\_\_\_ day of May, 2002.

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JAMES A. PUSATERI  
CHIEF BANKRUPTCY JUDGE