

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

IN RE:)	
)	
CHERYL ANN POLAND,)	Case No. 93-13185
)	Chapter 13
Debtor.)	
<hr style="border: 0.5px solid black;"/>		
)	
CHERYL ANN POLAND,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 99-5173
)	
EDUCATIONAL CREDIT MANAGEMENT)	
CORP; EQUIFAX ACCOUNTS RECEIVABLE;)	
and TGA, INC.,)	
)	
Defendants.)	
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MEMORANDUM AND OPINION

Cheryl Ann Poland, debtor, brings this adversary proceeding to determine the dischargeability of her student loan as provided for in her Chapter 13 plan. Educational Credit Management Corporation (“ECMC”), her student loan creditor’s assignee, takes exception to the discharge of its debt, essentially asserting that the Tenth Circuit’s holding in Andersen v. UNIPAC-HEBHELP (In re Andersen), 179 F.3d 1253 (10th Cir. 1999), should not apply retroactively to this case. Ms. Poland appears by her attorney Garry L. Howard. ECMC appears by its attorney N. Larry Bork. The parties submitted the matter to the Court on stipulations and briefs.

FACTS

The parties stipulated to the following facts. Cheryl Poland enrolled at Climate Control Institute on or about November 12, 1987. A few days prior, on November 6, 1987, Ms. Poland had procured a student loan from Nebhelp in the amount of \$4000.00. Due to health problems, Ms. Poland was unable to complete her courses at Climate Control Institute and withdrew from school on or about November 30, 1987. That same year, Nebhelp assigned the student loan to the U.S. Department of Education (“DOE”).

Ms. Poland filed her Chapter 13 petition in late 1993 and her plan in 1994. Ms. Poland’s plan included this clause:

The U.S. Department of Education alleges that the Debtor owes a student loan the approximate amount of \$9,877.70. The Debtor disputes the validity and amount of this debt. If a Proof of Claim is filed by the U.S. Department of Education, an objection to said claim shall be filed by the Debtor. *If no Proof of Claim is timely filed by the U.S. Department of Education, the claim shall be deemed discharged in its entirety upon completion of the Plan.* The Chapter Thirteen [13] Trustee shall make no distribution to the U.S. Department of Education unless by further Order of the Court.

(Emphasis added.)

The Court did not receive any objections to Ms. Poland’s Chapter 13 plan and DOE neither filed a proof of claim nor objected to the proposed plan. Ms. Poland’s plan was confirmed on April 20, 1994. The Department of Education did not appeal the confirmation order. On May 5, 1994, one day after the claim bar date, DOE filed its claim (Claim #10). On May 9, 1994, DOE filed a notice of assignment of Claim #10 to TGA, Inc. This is shown on the claims register as Claim #11. Ms. Poland objected to Claim #11. The Court entered an order on December 27, 1994 sustaining Ms. Poland’s objection and disallowing TGA’s claim in its entirety. Ms. Poland successfully completed her Chapter 13 plan and the Court entered an Order of Discharge and Final

Decree on January 6, 1999. No creditors objected to Ms. Poland's discharge. No one appealed or sought other relief in connection with the Discharge Order.

ECMC is the holder of the student loan obligation through a series of assignments. Following Ms. Poland's discharge, ECMC attempted to collect the loan. Ms. Poland reopened her bankruptcy case and commenced this adversary proceeding seeking this Court's determination that the language of her plan and of the Discharge order discharged the student loan. ECMC timely answered Ms. Poland's complaint alleging that the student loan had not been discharged and is nondischargeable. A Pre-trial Conference was held on August 24, 2000 and the parties elected to submit the matter to the Court on stipulation.

JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This adversary proceeding is a core proceeding. 28 U.S.C. § 157 (b)(2)(K).

ANALYSIS

The main controversy in this proceeding centers on the applicability of the Tenth Circuit's holding in Andersen v. UNIPAC-HEBHELP (In re Andersen), 179 F.3d 1253 (10th Cir. 1999). Ms. Poland considers Andersen dispositive because of the close factual similarities between her case and Andersen's. ECMC, on the other hand, disputes Andersen's validity as precedent because it was handed down after Ms. Poland's plan was confirmed. At the core of this dispute is the finality of this Court's orders confirming the plan and discharging the debt notwithstanding that each order affords Ms. Poland relief which is inconsistent with the Bankruptcy Code.

The Bankruptcy Appellate Panel and the Tenth Circuit have shed valuable light on these issues in Andersen, a case which is similar, but not identical to, the matter at bar. In Andersen, the Chapter 13 debtor owed ECMC for several student loan promissory notes. Andersen's Chapter 13 plan contained a provision that student loan creditors would be paid 10% of their claims and that

the remaining balance would be discharged. 179 F.3d at 1254. This provision also stated that excepting the education loans from discharge would impose an undue hardship on the debtor and her dependents and that confirmation of debtor's plan would constitute a finding of undue hardship rendering the loans dischargeable. Id. Andersen's plan was confirmed over the student loan creditor's untimely objection to the plan and the creditor did not appeal the order of confirmation. Id. After Andersen completed her plan payments and received her discharge to which the student loan creditor did not object, ECMC, as an assignee of the claim from the United States Department of Education, began collection efforts on two of the promissory notes. Id. at 1255. Thereafter, Andersen reopened her case to file a complaint to determine dischargeability. Id.

The bankruptcy court held that the plan language did not "constitute a judicial determination of hardship" and the student loans were not discharged. Andersen, 179 F.3d at 1255. On appeal, the Tenth Circuit Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court holding that the confirmation of the plan constituted a finding of undue hardship rendering the student loan dischargeable. Id. The Tenth Circuit Court of Appeals subsequently affirmed the BAP. Id.

Andersen is distinguishable from the facts at hand. First, Andersen's plan contained an explicit finding that denying her discharge of ECMC's obligation would cause her undue hardship. As the Tenth Circuit says, "...the finding of undue hardship in the confirmed plan changed the nature of the debt into a dischargeable debt. * * * Confirmation of the plan constituted a finding to that effect...." 179 F.3d at 1260. This facet is absent in Ms. Poland's case. In her plan she merely specified that the "claim" of the student loan creditor would be discharged if it failed to timely file a proof of claim or if its claim were disallowed. As it happened, DOE indeed filed its claim out of time and the Court sustained Ms. Poland's objection thereto. On this point, Ms.

Poland asserts that here, unlike in Andersen, the creditor wholly failed to protect its position, even in the face of an objection to its claim. Yet, this case is different from the Andersen scenario because it does not rely on an implied finding of undue hardship. Rather, the debtor's discharge simply relied upon the creditor not protecting its rights at the appropriate times. While this difference is troublesome to the Court, it does not determine the case.

Andersen holds that a creditor must actively protect its interests and may not rely on plan language which is contrary to the Bankruptcy Code to shield its debt from discharge. 179 F.3d at 1257 (citing American Bank and Trust Co. v. Jardine Ins. Serv. Texas Co., 104 F.3d 1241, 1246 (10th Cir. 1997); In re Szostek, 886 F.2d 1405, 1414 (3rd Cir. 1989)). If a creditor does not act when appropriate by objecting to a plan prior to confirmation, objecting to confirmation of a plan, appealing a confirmation order, or objecting to discharge when a plan is completed, it cannot argue that its debt remains viable after debtor has received a discharge. Andersen, at 1257. Other courts have also recognized that a creditor who does not timely object to a provision in a confirmed plan may not later complain about that provision even if it is inconsistent with the Code. See Lawrence Tractor Co. v. Gregory, 705 F.2d 1118, 1121 (9th Cir. 1983); Great Lakes Higher Education Corp. v. Pardee (In re Pardee), 218 B.R. 916, 922 (9th Cir. B.A.P. 1998).

The Andersen Court also emphasizes “the strong policy favoring finality which is stronger than the bankruptcy court’s and the trustee’s obligations to verify a plan’s compliance with the Code.” 179 F.3d at 1258 (quoting Szostek, 886 F.2d at 1406.) In accordance with the majority view, “most courts ultimately defer to the doctrine of res judicata because of the compelling need for finality in confirmed plans.” Andersen, at 1258 (listing cases). Therefore, confirmed plans are res judicata and cannot be collaterally attacked since the order confirming a Chapter 13 plan represents a “binding determination of the rights and liabilities of the parties” as set forth in the

plan. Andersen, at 1258 (quoting United States v. Richman, 124 F.3d 1201, 1209 (10th Cir. 1997)); 5 Collier on Bankruptcy ¶ 1327.01 [1] (15th ed. 1996).

As Andersen and Pardee note, although the plan should not have been confirmed with the discharge provision, the provision is nonetheless binding on the parties and the student loan is discharged. § 1327(a).¹ “This is especially true where, as here the plan has been confirmed, no appeal challenging the confirmation order was brought, all payments under the plan have been made, and the order of discharge has been entered.” Andersen, 179 F.3d at 1259. Here, ECMC’s predecessors failed to take any action on the provision except to file a late proof of claim which was disallowed following Ms. Poland’s objection. The doctrine of finality requires this Court to enforce the improper plan provision with regard to discharge.

ECMC argues that Ms. Poland had an obligation to initiate an adversary proceeding under Fed. R. Bankr. P. 7001 to discharge her student loan debt. ECMC asserts that Rule 7001, § 523(a)(8) and § 1328(a)(2) read together require the debtor to file a complaint to determine dischargeability with no action required by the creditor since the burden of proof lies with the debtor. However, in Andersen, ECMC presented a similar argument to which the Tenth Circuit responded that if a creditor fails to take an active role in protecting its interests, the creditor is in a “poor position to later complain about an adverse result.” 179 F.3d at 1257. While the burden of proof of dischargeability always lies with the debtor, student loan creditors cannot assert the absence of an adversary proceeding initiated by the debtor as a defense to their own inaction in not properly objecting to the Chapter 13 plan. Id. at 1258. Whether or not a complaint should have been filed by Ms. Poland during the pendency of the case does not dispose of the question of the

¹All statutory references are to the Bankruptcy Code, Title 11 U.S.C. unless otherwise noted.

finality of the confirmation and discharge orders before this Court. By filing a timely objection to confirmation or discharge, ECMC's predecessors could easily have avoided the present controversy.

ECMC strenuously argues that Andersen should not be applied "retroactively." In support of this proposition, ECMC cites cases relating to construction of particular statutes which hold that those constructions only apply going forward. In deciding whether to apply a decision retroactively, the Court must determine three factors. First, does the decision "establish a new principal of law, either by overruling clear past precedent on which litigants may have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed?" Second, will retroactive application of the decisional rule serve to hinder the decision's operation? Third, do inequities arise in imposing the rule by retroactive application? Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L. Ed. 2d 296 (1971).

The answer to all of these questions is no. Andersen establishes no new principal of law, rather it applies the doctrines of finality and res judicata to Chapter 13 plan provisions, a hardly innovative approach, particularly given the express language of §1327(a) which provides:

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

ECMC's assertion that "the whole process is a fiction created by the Tenth Circuit" suggests that it believes that the Tenth Circuit has fashioned a new discharge exception for student loans from the whole cloth. This suggests ECMC's fundamental misunderstanding of the Andersen court's rationale: that the final and non-appealable discharge order and confirmed plan have res judicata effect. This decision hardly "...establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied [cite omitted] or by deciding an issue of first

impression whose resolution was not clearly foreshadowed [cite omitted].” Chevron, 404 U.S. at 106, 92 S.Ct. at 355.

Further, in weighing the merits of enforcing Andersen retroactively, ECMC has made no showing that application of the Andersen rule retroactively is contrary to the Andersen decision itself or will hinder its operation. Again, Andersen, in following the lead of several other Circuits, merely considers the finality of confirmed plans and discharge orders as stated in the Code.

Finally, in weighing the equities, ECMC’s predecessors’ inaction in failing to protect their rights invited the equitable injury of which ECMC now complains. ECMC failed to protest either confirmation or the discharge. The Chevron formulation that a substantial inequity occurs when courts hold that the aggrieved party slept on his rights “at a time when he could not have known the time limitation that the law imposed on him” does not apply. Chevron, 404 U.S. at 106-107, 92 S.Ct. at 355. The Andersen plan was confirmed in 1990 and Andersen received her discharge in 1994, after the plan in this case was confirmed. The BAP’s decision in Andersen was issued in 1998, before the discharge in this case was entered. The Tenth Circuit’s decision affirming the BAP was issued June 7, 1999, after Ms. Poland received her discharge. The Court is not persuaded that ECMC and its predecessors believed, prior to Andersen, that they could simply ignore offending plan provisions and begin collection efforts on the student loans after a debtor was discharged. The procedure for objecting to Chapter 13 plans has changed little in the past ten years. The time frame for filing claims and appealing or requesting relief from bankruptcy court orders is well known by experienced creditors and their counsel. Andersen does not, as ECMC argues, hold that the time-honored *practice* of challenging student loan dischargeability through an adversary proceeding is no longer necessary. Rather, Andersen holds that when a creditor fails to object timely to the confirmation of a plan or a debtor’s discharge, the creditor is bound by the

final result of his inaction. This is not a novel concept in this Circuit's bankruptcy jurisprudence. See Frandsen v. Westinghouse Corp., 46 F.3d 975, 978 (10th Cir. 1995)(Res judicata barred creditor from raising issues which could have been raised during the bankruptcy proceeding.) and In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988)(Finality concerns require that creditor's inaction constituted his acceptance of a chapter 11 plan.) This Court believes that Andersen simply articulates a rule which has had long effect and which should be applied retroactively.

ECMC next asserts that the language in the Discharge Order that student loans or educational overpayment benefits are not dischargeable is binding. Unfortunately for ECMC, the express language of the Order is to the contrary. The Discharge Order provides,

“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 or educational benefit overpayment as specified in 11 U.S.C. Section 523(a)(8) in any case in which discharge is granted prior to October 1, 1996.”

Here, the discharge was granted well after October 1, 1996, suggesting that the discharge extended to ECMC's debt. The phrase “in any case in which discharge is granted prior to October 1, 1996” is a hangover from the 1990 public law amending § 1328 which amendment was scheduled to sunset October 1, 1996. The sunset date was subsequently repealed and the October 1, 1996 provision is immaterial and should be deleted from the form of the Discharge Order.² However archaic the language may be, the Discharge Order is final and non-appealable. Neither ECMC nor any other creditor has moved this Court for relief from the Order under Fed. R. Bankr.

²Pub. Law. No. 102-32, Title XV, § 1558, July 23, 1992, 106 Stat. 841.

P. 9024 and Fed. R. Civ. P. 60(b).

The significance of the discharge order is emphasized in a recent, but unreported decision of the Tenth Circuit Bankruptcy Appellate Panel. In In re Peterson, 251 B.R. 441 (Table), 1999 WL 977069 (10th Cir. B.A.P. 1999), the BAP considered a chapter 13 plan which provided that all unsecured creditors would be paid in the same manner and that each would receive not less than they would be due under a chapter 7 liquidation. The plan contained no specific reference to the student loan creditor. The debtor completed his payments under the plan and the court entered a Discharge Order which provided for a discharge of all debts except for those contained on an enumerated list which did not include a reference to §1328(a)(2) or to student loans. Neither the confirmation order nor the discharge order was appealed and the creditor sought no other post-judgment relief. The BAP carefully drew a distinction between this case and Andersen by pointing out the lack of an express finding of “undue hardship.” Instead, the BAP relied on the contents of the Discharge Order itself to determine that the Order unambiguously discharged the student loan. Relying on the same underlying authority that Andersen does, the BAP concluded that the creditor’s failure to raise the issue of dischargeability timely resulted in the dischargeability of the debt. See Andersen, 179 F.3d at 1256-57, see also American Bank & Trust Co. v. Jardine Ins. Servs. Tex., Inc., 104 F.3d 1241 (10th Cir. 1997). While the Peterson opinion is not precedent binding on this Court, its persuasive effect is clear.³ Even where the factual distinctions between Andersen and subsequent cases are considerable, courts in this Circuit should take Andersen’s teaching as an instruction to apply the doctrine of finality expressed in §1327(a) and prior case law, not as the judicial creation of a discharge exception for student loans. And, it is clear here

³See 10th Cir. B.A.P. Rule 8010-2.

that neither ECMC nor its predecessors did anything to bring to this Court's attention their concerns about the confirmation of the plan or the entry of the discharge order. Neither took an appeal nor sought post-judgment relief under Fed. R. Civ. P. 60(b) and Fed. R. Bankr. P. 9024. Under the Code, Andersen, and many other precedents, ECMC must be bound by the final judgment of discharge entered in this case.

ECMC also argues that the student loan survives discharge because the disallowance of its claim is not the equivalent of a discharge of its debt and that the plan itself only provided for discharge of the student loan "claim." ECMC correctly points out the distinction between "claim" and "debt." A claim is defined as "a right to payment," § 101 (5), and a debt is defined as a "liability on a claim." § 101 (12). Were the language of the plan the only language upon which debtor could rely, ECMC would likely prevail. However, the Discharge Order seems to discharge the "debt." ECMC believes the plan sought to "transform" the debt to a dischargeable obligation.

The matter of claim "transformation" is not in issue here. ECMC correctly states that many courts have carefully distinguished between the allowance of claims and the dischargeability of debts in chapter 13 cases. In In re Grynberg, 986 F.2d 367 (10th Cir. 1993), the Tenth Circuit was confronted with a similar argument by a chapter 11 debtor who asserted that the IRS' failure to file a proof of claim for certain gift taxes and the resulting disallowance of these taxes as a priority claim resulted in the taxes also being discharged under § 1141(d). Under the Code, taxes are a fundamentally different debt than student loan obligations. As the Grynberg panel observed, confirmation of an individual debtor's chapter 11 plan does not discharge excise taxes "whether or not a claim for such tax was filed or allowed, §523(a)(1)(A),' or taxes for which returns should have been but were not filed." 986 F.2d at 369. The cited code section makes clear that taxes

remain nondischargeable whether a claim is filed or not. Section 523(a)(8), on the other hand, contains no such broad language. Indeed, it provides for an exception to the exception to discharge, the finding of “undue hardship” and it makes no provision whatsoever regarding the effect of filing or allowing a student loan creditor’s claim on the debtor’s discharge.

ECMC’s final argument, that the journal entry disallowing the student loan claim only refers to Claim #11 filed by TGA, Inc., and not Claim #10 is without merit. Claim #11 was merely evidence that Claim #10 had been assigned by the Department of Education to TGA. This Court’s order sustaining debtor’s objection disallowed TGA’s claim which appears to be the same claim upon which ECMC relies. DOE’s claim is assigned and has been disallowed.

Neither this Court nor the Tenth Circuit encourages or abides the use of “hidden discharge” provisions in chapter 13 plans. Andersen, 179 F.3d at 1260 (“Our holding does not in any manner lessen a debtor’s burden of proof on the issue of undue hardship.”) Indeed, one court in this Circuit has reacted sharply to debtors counsel who attempted to systematically avail themselves of the benefits of Andersen by burying within plans explicit findings of undue hardship. See In re Hensley, 249 B.R. 318 (Bankr. W.D. Okla. 2000). This Court takes the debtor at her word that her inclusion of the discharge clause was intended to create a procedure by which she could obtain this Court’s determination of the degree and extent of DOE’s claim against her. ECMC’s distress is largely the product of its and DOE’s inaction in protecting their rights under rules and procedures which have changed very little since the enactment of the Code in 1978. Finality is deemed to be more important in the long term than the substantive error contained in the plan itself. Creditors must protect their interests and cannot be rewarded years after the fact for failing to do so. The Andersen case merely applied the long-standing rule of res judicata to chapter 13 and student loans and, as such, it may be applied retroactively.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS
In re: Cheryl Ann Poland, Case No. 93-13185-13; Adv. Case No. 99-5173
Memorandum and Opinion

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the student loan owed by Cheryl Ann Poland to Educational Credit Management Corporation was discharged pursuant to her Chapter 13 plan and Discharge Order and that JUDGMENT FOR PLAINTIFF shall be entered accordingly.

Dated this 23rd day of February, 2001.

ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS
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Memorandum and Opinion

CERTIFICATE OF SERVICE

The undersigned certifies a copy of the **Memorandum and Opinion** was deposited in the United States mail, postage prepaid on this 23rd day of February, 2001, to the following:

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Cheryl Ann Poland

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS
In re: Cheryl Ann Poland, Case No. 93-13185-13; Adv. Case No. 99-5173
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