

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

IN RE:)	
)	
DONALD RAY STROTKAMP,)	Case No. 90-13772
MARY JANE STROTKAMP,)	Chapter 7
)	
Debtors.)	
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)	
DONALD RAY STROTKAMP,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 00-5032
)	
EDUCATIONAL CREDIT MANAGEMENT)	
CORP. Successor in Interest to)	
TRANSITIONAL GUARANTY AGENCY,)	
INC., Successor in Interest to HIGHER)	
EDUCATION ASSISTANCE FUND and U.S.)	
DEPARTMENT OF EDUCATION,)	
)	
Defendants.)	
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)	
MARY JANE STROTKAMP,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 00-5033
)	
EDUCATIONAL CREDIT MANAGEMENT)	
CORP., Successor in Interest to HIGHER))	
EDUCATION ASSISTANCE FUND,)	
)	
Defendants.)	
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MEMORANDUM AND OPINION

This matter comes before the Court on the debtors' Complaints to Determine Dischargeability and Motions for Contempt, Turnover of Funds and for Attorney Fees. Debtors Donald Ray and Mary Jane Strotkamp, filed their Chapter 13 petition and plan on December 13, 1990. Debtors then amended their Chapter 13 plan on January 23, 1991, describing several student loans and providing that payments on the loans would be made pro rata with the other unsecured creditors. The amended plan also provided that its confirmation would represent a finding that payment of these particular debts would work an undue hardship on the debtors and that, upon this Court's granting a discharge, those debts would be discharged. The student loan creditors did not object to confirmation of the plan which was confirmed in February 1991, nor did they appeal the confirmation order. The Strotkamps completed their Chapter 13 plan and were discharged in 1994. After discharge, the Strotkamps received collection notices from the student loan creditors, but on the advice of counsel, they made no payments, considering the loans to have been discharged by the language of the Amended Plan.

In 1997, the Strotkamps hired current counsel who, after informing them that their student loans had not been discharged because a Complaint to Determine Dischargeability had not been filed and dischargeability had not been litigated, negotiated a payment agreement between the Strotkamps and ECMC. The Strotkamps made substantial payments under the agreement until June 1999 when the Tenth Circuit handed down its decision in Andersen v. UNIPAC-HEBHELP (In re Andersen), 179 F.3d 1253 (10th Cir. 1999). Relying on Andersen, the Strotkamps filed the instant complaints asserting not only that the student loan debts were discharged by the "undue hardship" language in the amended plan, but also that ECMC violated the discharge injunction by recommencing the collection process in 1994, and that all of the funds collected by ECMC, whether by payment, garnishment or set-off, should be disgorged.

The Court finds that, while Andersen compels the conclusion that the debts were indeed discharged, ECMC did not violate the discharge and that the payments made voluntarily by the Strotkamps need not be disgorged. Payments received by ECMC via garnishment or IRS set-off before announcement of the Andersen decision need not be disgorged. Only those payments obtained by ECMC post-Andersen via garnishment or set-off must be returned to the Strotkamps. Further, the Court denies the Strotkamps' request to hold ECMC in contempt for violating the discharge injunction and denies the award of attorneys fees to the Strotkamps' counsel.

JURISDICTION

The Court has jurisdiction over these proceedings under 28 U.S.C. § 1334. This adversary proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FACTS

The parties submit this case on a somewhat incomplete set of stipulations. Donald and Mary Strotkamp ("the Strotkamps") filed their Chapter 13 petition and plan on December 13, 1990. On January 23, 1991, the Strotkamps amended their Chapter 13 plan to include two student loans owed to the Higher Education Assistance Foundation (HEAF) and one to Payco, its collection agent, as well as a debt of \$1622.18 to the United States Veterans Administration for overpayment on veteran's benefits. The amended Chapter 13 plan listed the student loan amounts due for each debtor, \$3,002.14 and \$586.74 for Donald, and \$6,426.87 for Mary, and provided that payments on the loans would be made pro rata with the other unsecured creditors. The plan also stated that the balance of the student loans would be ". . . discharged upon completion of all plan payments. Confirmation of the plan shall constitute a finding that the payment of the remainder of the debt will impose an undue hardship on the debtors and the debtors' dependents. . . ." Neither HEAF nor Payco objected or otherwise responded and the plan was confirmed in

February 1991. Nor did they appeal the confirmation order. The Strotkamps completed their Chapter 13 plan and received a discharge on March 25, 1994.

Subsequent to the Strotkamps' discharge, Educational Credit Management Corporation ("ECMC"), successor in interest to HEAF and Payco, began collection efforts on the unpaid student loan debts. The parties stipulate that ECMC obtained partial payments as a result of garnishment and set-off of income tax refunds by the Internal Revenue Service.¹ On the advice of their attorney at that time, the Strotkamps did not voluntarily make any payments on their loans.

In 1997, the Strotkamps hired current counsel who informed them that their student loans had not been discharged in their Chapter 13 plan. The Strotkamps' attorney sent correspondence to ECMC stating, in part:

I have been retained by [the Strotkamps] to help them out with some problems they have had with their student loans. Their previous attorney advised them that these accounts had been discharged through a Chapter 13 bankruptcy, but this was not the case. *I have advised them that these accounts are still valid and must be paid.* In order to take care of these debts, the Strotkamp's have made application and been approved to withdraw funds from a vested 401K plan in order to pay these accounts in full. (Emphasis added)

In the letter, debtors' counsel also references negotiations to waive fees and interest on Mrs. Strotkamp's student loan. On April 29, 1997, Mrs. Strotkamp entered into a repayment agreement with ECMC for \$9,493.22. According to the agreement, Mrs. Strotkamp was to pay a \$3,500 down payment, with payments of \$100 per month thereafter for the first 12 months until the debt was repaid, with an annual review every year to determine the amount still owing.

¹The record is unclear whether the garnishments occurred by ECMC obtaining a judgment in some court against the Strotkamps, or whether the amounts were garnished pursuant to 31 U.S.C. § 3720D.

The parties also stipulate to the Strotkamps' repayment history. Per the repayment agreement, Mrs. Strotkamp paid ECMC a \$3,500 lump sum. She also paid \$100 per month beginning June 1997 through June 1999 for a total payment of \$2,600. In addition to these payments, ECMC offset Mrs. Strotkamp's tax returns twice, once on February 10, 1997, and again on February 11, 2000 totaling \$2,626.10. ECMC also garnished her wages four times in 2000, obtaining \$393.60. Mrs. Strotkamp has repaid \$9,119.60 of her student loan debt.

The stipulations do not refer to a repayment agreement between Mr. Strotkamp and ECMC. Neither do they clarify the balance of Mr. Strotkamp's student loan debts in 1997. Mr. Strotkamp made a lump sum payment of \$3,000.00 in April, 1997 and the IRS offset two tax refunds, one in 1996 for \$437.00, and one in 1997 for \$867.00. Mr. Strotkamp made no monthly payments. His lump sum and ECMC's offsets total \$4,304.00.

The Strotkamps stopped making payments in June 1999 when the Tenth Circuit handed down its decision in Andersen v. UNIPAC-NEBHELP (In re Andersen), 179 F.3d 1253 (10th Cir. 1999). In Andersen, the Tenth Circuit held that a plan which is confirmed with a provision providing that excepting education loans from discharge would impose an undue hardship on the debtor and his or her dependants, is a binding adjudication of undue hardship rendering the loans dischargeable. Andersen, 179 F.3d at 1254. On February 7, 2000, in response to this decision, the Strotkamps filed separate adversary proceedings, seeking a determination that the student loan debts were discharged, that ECMC be held in contempt, that ECMC be ordered to turn over all funds collected subsequent to the bankruptcy discharge, and attorney fees of \$750 in each case.

ANALYSIS

At the core of this case is the conduct of the creditor in making its collection efforts and the

voluntariness of the various payments made by or obtained from the debtors. 11 U.S.C. §524(f)² provides that nothing contained in the statutory provisions on reaffirmation prevents a debtor from “voluntarily repaying any debt.”³ § 524(f). The Court objectively decides whether a payment is voluntary, focusing on the conduct of the creditor receiving the payments. In re Wiley, 224 B.R. 58, 72 (Bankr. N. D. Ill. 1998).

The inquiry should be whether the repayment is free from the influence or coercion of the creditor which, in turn, may be established by showing: (1) the creditor took no misleading or coercive action and (2) the creditor reasonably assumed that the debtor’s payments were voluntary. The court should not be required to inquire into the psyche of the debtor to ascertain the forces which motivated the payments.

3 Norton Bankruptcy Law and Practice 2d § 48:3, *Informal Acts to Collect* (2000).

As established by the stipulated facts and exhibits, the Strotkamps voluntarily agreed to repay their student loans in April 1997. The funds paid ECMC by the Strotkamps’ 401(k) retirement account liquidation and the \$100 per month payments from June 1997 through June 1999, totaling \$2600, were voluntary payments under § 524(f). Similarly, the Donald Strotkamp lump sum payment of \$3,000 and the Mary Strotkamp lump sum payment of \$3,500 were also voluntary. Although the Strotkamps’ briefs assert that their “position never wavered concerning the fact that the debt had been discharged,” and that they finally sent payments in April 1997 “due to the threat of garnishment and further collection activity” and to avoid further credit problems,

²All subsequent statutory references are to the Bankruptcy Code, Title 11, United States Code, unless otherwise noted.

³Section 524(c) and (d) refer to the strict guidelines that must be followed in order to reaffirm a discharged debt. The Strotkamps did not reaffirm their student loans and these subsections are not relevant here.

this position is belied by their own counsel's stated position in the letter quoted above that the debts had not been discharged. Nothing in the record shows that these payments were anything but voluntary. It simply appears that the Strotkamps received and acted upon their attorney's advice that their student loans had not been discharged and they immediately made arrangements to begin repayment. ECMC could reasonably have assumed that these payments were voluntary. Its efforts to collect a debt that both parties considered to have been excepted from discharge were neither misleading nor coercive. Therefore, it would be inequitable to require ECMC to disgorge these payments. The lump sum payment of \$3,000 made by Donald, and the lump sum payment of \$3,500 made by Mary and Mary's monthly voluntary payments totaling \$2,600 are not subject to turnover.

In addition, the IRS offsets made May 27, 1996 against Mr. Strotkamp and on February 10, 1997 against both Strotkamps are not subject to turnover even though the payments were not voluntary. The IRS has authority to set off from refunds of income taxes amounts due and owing to the Government for student loans under the Deficit Reduction Act of 1984. See 31 U.S.C § 3720A; 26 U.S.C. § 6402(d). Under this tax intercept program, upon receiving notice from any Federal agency that a named person owes a past-due legally enforceable debt to such agency, the IRS shall offset against any overpayment payable to such person the amount of the debt; pay the offset amount to the agency; and, notify the taxpayer that their overpayment has been reduced by an amount necessary to satisfy such debt. "Federal agency" means a department, agency or instrumentality of the United States, 26 U.S.C. § 6402(f), which would include the Department of Education. 31 U.S.C. § 3720A(b) provides what notice shall be given to the taxpayer that their tax refund is about to be setoff to pay a debt to another Federal agency, such as the Department of Education. Nothing in the record suggests that the Government failed to meet its notice obligations. Further, this Court has subject matter jurisdiction to hear the Strotkamps' claims that Andersen precluded any more

offsets from occurring. 26 U.S.C. § 6402(e) provides that, [t]his subsection does not preclude any legal, equitable, or administrative action against the Federal agency to which the amount of such reduction was paid.”

At the time of these offsets, ECMC, like debtor’s counsel, clearly believed that the student loans were not discharged. This was an understandable belief, given the state of the law in 1996 and 1997. The contemporary understanding of the law on “bootstrap” discharges of student loans is well set out in former United States Bankruptcy Judge John K. Pearson’s well-reasoned opinion in In re Andersen, Case No. 90-13912, Adv. No. 96-5277 (Bank. D. Kan. August 13, 1997), *rev’d*. 179 F.3d 1254 (10th Cir. 1999). Furthermore, the Strotkamps took no action to challenge these offsets at the time they occurred by asserting a violation of the discharge injunction. Their acquiescence at this time was consistent with their apparent contemporary understanding of the law and amounts to a voluntary waiver of their right (if any) to challenge these offsets. Thus, the 1996 and 1997 offsets of \$437.00, \$867.00, and \$645.00 are not subject to disgorgement.

The Court does find however that the funds offset by the IRS subsequent to the Andersen decision along with the garnishments taken in 2000 are subject to turnover. By the time these collection actions occurred in January through March of 2000, it was clear that ECMC’s debts had indeed been discharged, at least under the Andersen rule. Based upon that decision, the Strotkamps filed these adversary proceedings to recover those payments. They clearly did not acquiesce in either the garnishments or the 2000 offsets. Further, garnishments and unchallenged offsets are, by their very nature, involuntary payments. Therefore, the IRS offset in the amount of \$1,981.10 and the four garnishments in the amount of \$98.40 each should be disgorged.

The Strotkamps also seek to have ECMC held in contempt for violation of the § 524(a) discharge injunction. Section 524(a)(2) provides that a discharge under Title 11 “. . . operates as

an injunction against . . . an act, to collect, recover or offset any such debt as a personal liability of the debtor. . . .” The permanent injunction in the confirmation order only enjoins proceedings with respect to discharged debts. Systemcare, Inc. v. Wang Lab. Corp., 85 F.3d 465, 469 (10th Cir. 1996). As recently as 1999, ECMC and the debtors both believed that the student loan debts had not been discharged. The Strotkamps have not proven that ECMC wilfully and knowingly violated the discharge injunction, nor have they shown that during the time they were repaying their student loans, that ECMC knew that it was in violation of § 524(a). Even though ECMC sent collection letters to the Strotkamps, the stipulations do not reflect that these letters were threatening or coercive. The stipulations simply show that the Strotkamps were first advised that their loans were discharged, but then current counsel informed them they were not discharged. In fact, at the time of repayment, both parties believed that the debts were still owing, making the payments voluntary and the IRS offsets proper. This falls far short of showing that ECMC acted with knowing intent to violate the discharge injunction. ECMC cannot be held in contempt for violation of the § 524(a) discharge injunction.

Lastly, the Court similarly denies the Strotkamps’ request for attorneys’ fees. There are three judicially-created grounds for awarding attorneys’ fees outside of a statute or contract providing for such “(1) when the litigant preserves or recovers a fund for the benefit of others; (2) when a losing party acts in bad faith, vexatiously, wantonly, or for oppressive reasons; or (3) when a defendant wilfully disobeys a court order.” Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 259, 95 S. Ct. 1612 (1975). Although §524 does not authorize an award of attorneys’ fees, such an award would be appropriate for wilful and intentional violations of the discharge order. Stevens, 217 B.R. 757, 762 (Bankr. D. Md. 1998). Because the stipulated facts do not support a finding that ECMC intentionally violated the discharge injunction and the

Strotkamps have not met the three grounds listed above, the Court denies their request for attorneys' fees.

IT IS THEREFORE ORDERED THAT ECMC turnover \$2,374.70 to Mary Jane Strotkamp forthwith. This amount represents funds garnished and offset subsequent to the Andersen decision.

IT IS ALSO ORDERED THAT any remaining balance on Donald Ray and Mary Jane Strotkamps' student loans be discharged.

IT IS FURTHER ORDERED THAT the balance of the relief sought by the Strotkamps in their Complaints is DENIED.

A Judgment on Decision will issue this 16th day of October, 2001.

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

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the **Memorandum and Opinion** were deposited in the United States mail, postage prepaid on this 16th day of October, 2001, to the following:

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