In the United States Bankruptcy Court

for the Northern District of Iowa

DAVID R. ZULAICA HEIDI ANN ZULAICA a/k/a HEIDI ANN HABEL a/k/a HEIDI ANN OLSON *Debtor(s).*	Bankruptcy No. 95-22000KD Chapter 7
HEIDI ANN ZULAICA a/k/a HEIDI ANN HABEL a/k/a HEIDI ANN OLSON *Plaintiff(s)* vs. NATIONAL CREDIT SERVICES CORPORATION and IOWA COLLEGE STUDENT AID COMMISSION *Defendant(s)*	Adversary No. 95-2176KD

ORDER

On June 4, 1996, the above-captioned matter came on for trial pursuant to assignment. Plaintiff/Debtor Heidi Ann Zulaica appeared in person with Attorney Thomas McKay. Defendant Iowa College Student Aid Commission ("ICSAC") appeared by Attorney James Wisby. Evidence was presented after which the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF FACTS

Debtor and her husband filed their Chapter 7 Petition on October 17, 1995. Debtor filed this adversary proceeding on October 27, 1995 requesting the Court determine dischargeability pursuant to § 523(a)(8) concerning certain student loans.

Debtor obtained three student loans while attending various institutions of higher learning. The first loan was obtained from Dubuque Bank and Trust while Debtor attended Loras College during the 1985-86 school year. While at Loras, she was enrolled in the College of Liberal Arts. The second loan was also obtained from Dubuque Bank & Trust Co. for summer school in the summer of 1986 while Debtor attended the University of Northern Iowa.

Debtor obtained a third loan in 1990 to allow her to attend Northeast Iowa Community College in Peosta where she received a certificate as a dental assistant. The dischargeability of this loan is not in issue in this proceeding.

The evidence establishes that Debtor attended Loras College and the University of Northern Iowa as a single person. After attending UNI for a short time, she moved to New York where she was briefly employed as a nanny. She returned to Dubuque and eventually married. Debtor's daughter, Hailie, who is 7 years old, attends school, and resides with Debtor and her current husband, David Zulaica. It was while Debtor was married to Hailie's father, that she attended Northeast Iowa Community College and received her certificate as a dental assistant.

Debtor's first marriage was terminated by dissolution and Debtor later married David Zulaica. They lived in Iowa City and West Branch and Debtor became employed as a dental assistant at the School of Dentistry at the University of Iowa where she earned approximately $8.50 per hour. The total amount of Debtor's earnings is somewhat uncertain and little evidence was presented on this issue. The Court, however, finds that Debtor was employed full-time. As a full-time employee, Debtor's income would have been between $17,000 and $18,000 per year.

Debtor and her husband, David Zulaica, also have a daughter, Makayla, who is approximately 11 months old. Debtor voluntarily terminated her employment at the University of Iowa in July of 1995, at the time of the birth of this child. Since that time, Debtor has not sought employment and has remained in her home providing care for her children. Since July 1995, Debtor has had no earned income. She does receive child support for Hailie in the amount of $483 per month from Hailie's father.

The parties have stipulated that the first two loans are the loans in controversy under § 523(a)(8)(A) as being more than 7 years old. The parties, on the record, stipulated that both loans were due and owing as of April 15, 1987. The parties also stipulated that there were at least 39 months of suspension since the beginning of the repayment period. While the evidence is not specific, the record does establish that Debtor has made some payments toward these student loans. The parties also stipulated that the amount due is the amount alleged by ICSAC in the total amount of approximately $6,400 including collection costs.

Debtor raises two arguments. The first argument is one of law. Debtor asserts that there were no suspensions obtained prior to the first due date of the payments. She argues that suspensions obtained after the initial due date of the student loan obligation should not be subtracted from the full age of the debt under § 523(a)(8)(A). Therefore, she asserts, the debt was more than seven years old at the time of filing and is dischargeable.

In her second argument, Debtor relies on undue hardship under § 523(a)(8)(B). She asserts that she and her family will suffer undue hardship if the two student loans are not discharged. Debtor testified that she is 28 years of age and has no health problems. She has a certificate as a dental assistant and was employed at the University of Iowa full-time prior to her voluntary termination in July of 1995. She testified that she left in good standing and that, if employment were available, she qualifies for rehiring. She did testify, however, that her certificate expired in August of 1995 and that she would have to retake the board test within a five year period after the expiration of the certificate. The cost for retaking the test is approximately $150. There may also be some other minor costs associated with recertification.

Upon recertification, Debtor is qualified to gain employment in a field in which she has previously held full-time employment. She testified that she is not aware of any reason why she could not go back to work in her profession. She was earning $8.50 at the time of her resignation and she could return to this profession at a similar rate. She testified that she had take home pay of approximately $1128 per month while she was employed at the University of Iowa.

Debtor's main basis for asserting undue hardship is her belief that child care and associated costs of employment will exhaust all income which she could make from employment. She testified that it costs approximately $120 per month for Hailie to attend day care before and after her regular school. Debtor also testified that, in Iowa City, child care for Makayla would cost $800 per month. Debtor testified that the inclusion of parking and travel expenses would leave no funds available from her employment. She stated that after discussion with her husband, it was determined that she would not seek employment. Finally, Debtor testified that she has no way to repay these loans and it would cause an undue hardship to herself and her dependent daughters if this debt were not discharged.

Debtor's husband, David Zulaica, remains employed at the Iowa Department of Transportation and grosses approximately $812 every two weeks. This reflects a gross income of approximately $1759 per month. In addition, he is a member of the National Guard and earns more than $100 per month as a Guard member.

Debtor offered Exhibits 1, 2, 3, and 4 which were received into evidence without objection. ICSAC offered Exhibits A, B, C, and D which were received into evidence without objection. Debtor made a foundational objection to Exhibit E and it was not reoffered subsequent to that time. The parties were offered an opportunity to submit additional briefs and both declined.

CONCLUSIONS OF LAW

Debtor's complaint asserts that her student loan obligations are dischargeable under either § 523(a)(8)(A) and/or § 523(a)(8)(B). Student loan obligations are ordinarily dischargeable in bankruptcy only in a case filed after seven years from the date the loan first became due, exclusive of any applicable suspension of the repayment period. 11 U.S.C. § 523(a)(8)(A). Such debts may be dischargeable within the seven-year period if:

> excepting such debt from discharge ... will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8)(B). The burden of proof of dischargeability under § 523(a)(8) is on Debtor. In re Woodcock, 45 F.3d 363, 367 (10th Cir.), cert. denied, 116 S. Ct. 261 (1995); In re Bachner, 165 B.R. 875, 880 (Bankr. N.D. Ill. 1994).

SUSPENSION OF REPAYMENT PERIOD

Absent a showing of undue hardship under § 523(a)(8)(B), the dischargeability of an educational loan is governed by

§ 523(a)(8)(A) which provides:

a. A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt -
    8. for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, unless -
        A. such loan first became due before seven years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition.

The overall meaning of this provision is that if there are no suspensions, extensions or deferrals given to the debtor, educational loans are dischargeable if a bankruptcy petition is filed more than seven years after payments become due. In re Eckles, 52 B.R. 433, 434 (E.D. Wis. 1985); In re Miehe, Adv. No. L88-0029D, slip op. at 4 (Bankr. N.D. Iowa Dec. 28, 1988). In other words, suspensions of repayment periods are to be left out when calculating the seven-year period. Miehe, slip op. at 5.

ICSAC asserts that subtracting the length of suspensions granted during the repayment period (39 months) from the age of Debtor's student loan obligations disqualifies them from dischargeability under § 523(a)(8)(A). Debtor argues that only deferrals obtained prior to the first due date can reduce the age of the loans under (8)(A). Debtor cites In re Nunn, 788 F.2d 617 (9th Cir. 1986), to support her argument. She admits in the pretrial statement, however, that under Nunn, the fact that no extensions were granted prior to the first due date of the notes is probably not relevant.

The Ninth Circuit Bankruptcy Appellate Panel has recently considered this argument in In re Thorson, 195 B.R. 101 (9th BAP 1996), as a matter of first impression. It concluded that the debtor's position went beyond the plain meaning of the statute. Id. at 104. The court stated that Nunn did not control the case because it did not deal with the parenthetical "exclusive of any applicable suspension of the repayment period". Id. at 105. It held that "section 523(a)(8)(A) requires . . . that any valid suspension during the repayment period be deducted." Id. at 106.

The word "suspension" in § 523(a)(8)(A) should be interpreted broadly to include any time the original payment period is set aside either by cessation or modification of payments. Id. at 105; In re Gibson, 184 B.R. 716, 718 (E.D. Va. 1995) (holding previous Chapter 7 automatic stay constitutes a "suspension"), aff'd, ___ F.3d ___, 1996 WL 267322 (4th Cir. 1996). Many cases have subtracted suspensions occurring after the initial due date from the length of the term of the note to find student loans to be nondischargeable under § 523(a)(8)(A). See In re Georgiana, 124 B.R. 562 (Bankr. W.D. Mo. 1991) (declaring student loans nondischargeable in 1990 where initially due 2/1/83 but debtor had 9 periods of forbearance totaling 53 months between 5/1/83 and the petition date). This Court concludes that all suspensions before or after the initial due date of student loans are deducted from the age of the loan in determining whether such loans are excluded from discharge under § 523(a)(8)(A).

Debtor's bankruptcy petition was filed on October 16, 1995, approximately eight years and six months after the repayment period for Debtor's educational loan began on April 15, 1987. After the original due date, ICSAC granted extensions of the repayment period of at least 39 months, or 3 years and three months. That period is not included in determining the time which elapsed between the first due date for repayment and the filing of a bankruptcy petition. Under § 523(a)(8)(A), the loan must have been due for seven years prior to filing for bankruptcy to be dischargeable. Debtor's loan was due five years and three months prior to filing. Therefore, Debtor's educational loan is not excepted from discharge under § 523(a)(8)(A).

UNDUE HARDSHIP

Debtor does not work outside the home and reports personal income of $483.00 child support from her first husband. Combining this with her current husband's income, the couple has a net total monthly income of $1,727. Debtor claims she and her children would suffer undue hardship if her student loans are not discharged.

ICSAC states that Debtor is in good health and that the cost of child care and the expenses related to employment are not sufficient reasons for her not to return to employment. She was making $8.50/hr. before she quit her U of I Hospitals job before the birth of her youngest child. ICSAC argues Debtor does have the ability to retire this debt in the future without substantial hardship to her or her family.

In order to have a student loan obligation excepted from discharge for undue hardship, Debtor must make the following three-part showing:

1. that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
2. that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. that the debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987), adopted in In re Hawkins, Adv. No. 94-3034XF, slip op. at 8 (Bankr. N.D. Iowa, June 29, 1995) (Edmonds, C.J.).

Two circuit courts have applied the Brunner test for undue hardship: In re Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993) (expressly adopting Brunner test), and In re Cheesman, 25 F.3d 356, 359-60 (6th Cir. 1994), cert. denied, 115 S. Ct. 731 (1995) (reviewing facts under Brunner). The Seventh Circuit in Roberson discussed the rationale for each of the three parts of the Brunner test. Roberson, 999 F.2d at 1135-36. The first part, that the debtor is currently unable to repay the loan and maintain a minimal standard of living, is considered a minimum requirement dictated by common sense. Id. at 1135. The second part of the test requires a debtor to show that her critical financial condition is likely to continue for an extended period of time. Dischargeability should be based on a "certainty of hopelessness" of repayment, rather than a present inability to repay student loans. Id. at 1136. The third part of the test examines the debtor's good faith efforts to repay the loan, the quid pro quo for receipt of a government-guaranteed student loan. Hardship may not be considered "undue" for purposes of § 523(a)(8)(B) if a debtor's financial condition is a result of her own negligent or irresponsible conduct. Id. A debtor's good faith is measured by "efforts to obtain employment, maximize income and minimize expenses," and by inquiring whether the debtor is culpable for causing her own poor financial condition. Roberson, 999 F.2d at 1136.

The Court concludes that Debtor has failed to meet her burden of proving the three parts of the Brunner test. Debtor has the capability of earning $18,000 per year and additionally receives child support of $483 per month. She has no health problems. She has a skill which is marketable and she could become employed fairly readily. It was Debtor's calculated decision to remain at home with her children and she now wishes to utilize that as a reason for not repaying these student loan obligations.

The costs of child care and employment expenses can be a consideration in determining dischargeability based on undue hardship. For example, in In re Goranson, 183 B.R. 52, 56 (Bankr. W.D.N.Y. 1995), the court found undue hardship where the debtor's family was living near the poverty level and she was only able to find minimum wage employment. The court concluded that even if the debtor could find full-time employment, increased costs for child care, clothing and food would prevent her from paying her student loans without undue hardship. Id. at 57. By contrast, in In re Wilson, 177 B.R. 246, 250 (Bankr. E.D. Va. 1994), the court found that the debtor's decision not to seek employment in order to stay at home to raise her child did not fall within the narrow exception of

undue hardship. The debtor had a bachelor's degree in Business Administration and had earned a good salary in the past. Id. at 249.

Debtor is dependent on her current husband's earned income and her former husband's child support payment. The amounts available to her family are not so low that she could not maintain a minimal standard of living for the family while still making student loan payments. The Court is not convinced that Debtor's potential net income from a $18,000 per year job would be devoured by child care and employment expenses. Debtor voluntarily chose to become unemployed in order to stay home with her children. This situation could easily change if Debtor decided to return to the work force. No additional circumstances exist precluding Debtor from making payments on her student loans in the foreseeable future.

As to the third part of the Brunner test, the record is not clear concerning the amount or number of payments Debtor has made in a good faith effort to repay her student loans. The fact that Debtor voluntarily quit her job undermines a finding of good faith as she has not attempted to maintain employment and maximize income.

Debtor has failed to meet her burden of proving undue hardship. The Court concludes that Debtor's student loan obligations are not excepted from discharge under § 523(a)(8)(B).

COLLECTION COSTS

Debtor states that the notes evidencing her student loan obligations to ICSAC are subject to the Iowa Debt Collection Practices Act, Iowa Code Ch. 537, which prohibits charges for collection costs and fees. She argues that this is not preempted by Federal regulations.

ICSAC asserts that it is required by Federal regulation to charge collection costs. See 34 C.F.R. § 682.410(b)(2), (9), and § 3060. The relevant Federal statute states as follows:

> Notwithstanding any provision of State law to the contrary --
>
> 1. a borrower who has defaulted on a loan . . . shall be required to pay . . . reasonable collection costs.

20 U.S.C. § 1091a(b).

Generally, when a debt evidenced by a note allowing attorneys fees and other costs of collection is determined nondischargeable, the attendant fees and costs are similarly nondischargeable. Klingman v. Levinson, 831 F.2d 1292, 1296-97 (7th Cir. 1987); see also In re Claxton, 140 B.R. 565, 570 (Bankr. N.D. Okla. 1992) (holding fees and costs also nondischargeable where they are expressly provided for in the notes and such provision is enforceable absent bankruptcy). Debtor argues that provision for fees and costs is not enforceable under the Iowa Code.

Federal law may preempt state law where an actual conflict between federal and state regulations makes compliance with both a physical impossibility. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). The court in Jackson v. Culinary School, 27 F.3d 573, 580, 580 (D.C. Cir. 1994), vacated and remanded, 59 F.3d 254 (D.C. Cir. 1995) (on declaratory judgment issue), stated that the Higher Education Act, which includes 20 U.S.C. § 1091a, did not expressly preempt state consumer defenses. It notes that the Act, however, does expressly preempt state usury laws, statutes of limitation and infancy defenses. Id.; see also Armstrong v. Accrediting Council for

Continuing Educ. & Training, Inc., 832 F. Supp. 419, 428 (D.D.C. 1993) (citing § 1091a(b) as one type of limited explicit preemption). The Court concludes that § 1091a(b) likewise expressly preempts State statutes barring collection costs. Cf. In re Simons, 119 B.R. 589, 594 (Bankr. S.D. Ohio 1990) (stating that, in Ohio, stipulations in notes providing for attorneys fees and costs of collection are contrary to public policy and void). Therefore, the collection costs related to Debtor's nondischargeable student loans are likewise excepted from discharge.

POSTPETITION INTEREST

ICSAC argues that postpetition interest on this nondischargeable debt is charged against Debtor, not Debtor's estate and should be included in its judgment. The Eighth Circuit has stated that postpetition interest and penalties accruing as a result of nondischargeable tax liabilities are also nondischargeable. In re Hanna, 872 F.2d 829, 831-32 (8th Cir. 1989). The rationale used in Hanna has also been applied concerning interest on nondischargeable student loans. Leeper v. Pennsylvania Higher Educ. Assistance Agency, 49 F.3d 98, 101 (3d Cir. 1995) (concluding that interest on nondischargeable student loans continues to accrue during the pendency of Chapter 13 plan). The Court concludes that postpetition interest attributable to this nondischargeable debt is likewise nondischargeable.

WHEREFORE, Debtor's student loan obligation owed to ICSAC is not excepted from discharge pursuant to § 523(a)(8).

FURTHER, the two student loans which became due April 15, 1987 did not become due more than seven years before the date of filing of the petition, exclusive of suspensions of the repayment period.

FURTHER, excepting this obligation from discharge will not impose an undue hardship on Debtor and her dependants.

FURTHER, collection costs and fees and postpetition interest associated with Debtor's student loan obligation are also nondischargeable.

FURTHER, judgment shall enter accordingly.

SO ORDERED, this 24th day of June, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge